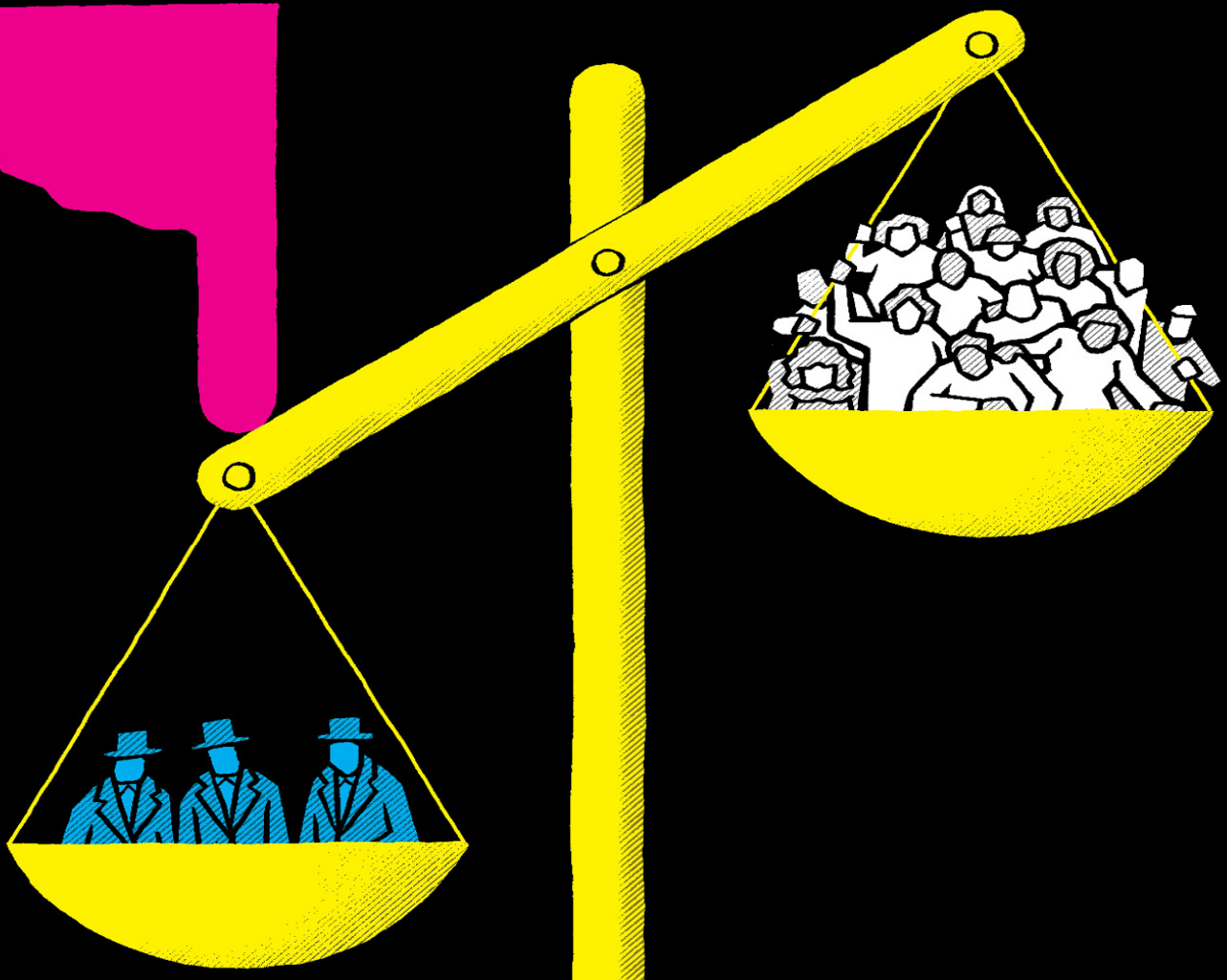
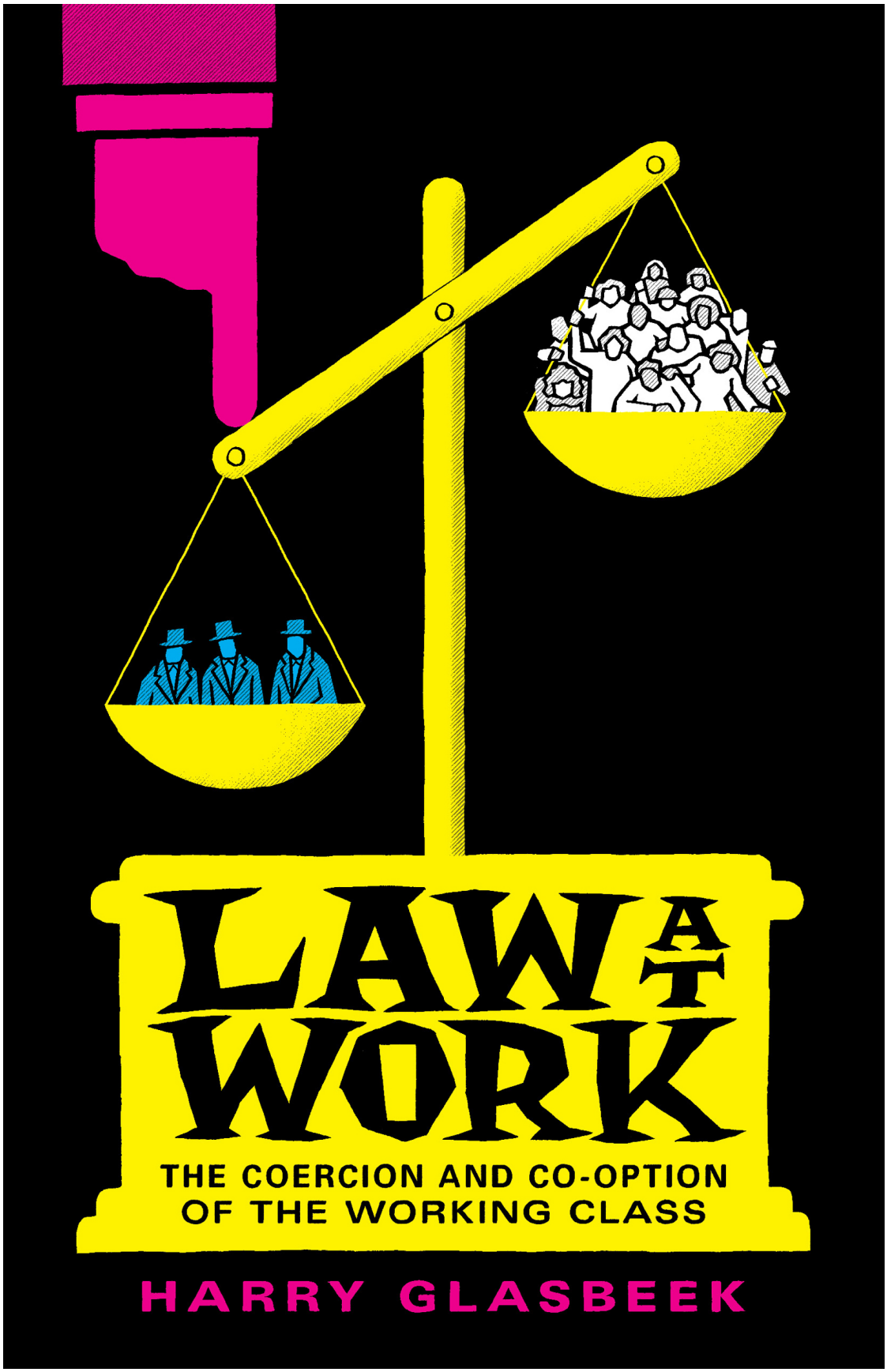


# LAW AT WORK

## THE COERCION AND CO-OPTION OF THE WORKING CLASS

HARRY GLASBEEK


LAW AT WORK
THE COERCION AND CO-OPTION OF THE WORKING CLASS
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“Harry Glasbeek masterfully unmasks the hidden assumptions that inform the law at work, revealing law’s role in justifying and operationalizing employer superiority. *Law at Work* is driven by a passionate demand for human emancipation and a rigorous demonstration of why that is not possible under capitalism. Even if you think you understand labour law, you don’t until you’ve read this book.”

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**Larry Savage**, chair, Department of Labour Studies, Brock University

“Harry Glasbeek is a passionate public intellectual, deeply committed to sharing all that he knows. And he knows a lot—especially about the class bias buried deep within our labour laws. Glasbeek’s insights in *Law at Work* match everything I’ve experienced over decades of union work. He’s also an utterly readable writer, using wit and understatements that make you laugh out loud, even as you shudder.”

**Laurell Ritchie**, retired national representative, Unifor

“In *Law at Work*, Harry Glasbeek reveals how the law’s claims to equality and justice obscure how legal rules and institutions are tilted to help the few at the expense of the many. Glasbeek vividly shows how instead of promoting workers’ freedom, the employment contract—one of capitalism’s foundational legal devices—cultivates workers’ subordination. Drawing on his encyclopedic knowledge of labour law and history, *Law at Work* offers a compelling, erudite, and energetic explanation of how labour law restricts workers’ power and hinders our collective ability to imagine democracy and freedom at work.”

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"Why are workers killed or maimed at work but not employers? From the fourteenth century to the COVID-19 pandemic, *Law at Work* covers the gamut of dangers workers have faced in the workplace. Harry Glasbeek explains how the common law of torts, the judiciary, and statutory laws have served the interests of capitalists and capitalism against the interests of workers. Using sardonic wit, insightful analysis, and an entertaining style, Glasbeek challenges the conventional wisdom that the law treats all fairly and that justice can be achieved through the courts."

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"Harry Glasbeek provides the reader with a timely and accessible demonstration of all the ways in which the law acts to limit what a contract of employment can provide to workers when it is entrenched in a system of production that depends on extracting labour from the many for the profit of a few. From a master of the field, *Law at Work* is *the* legal explanation of why the employment contract under capitalist systems of accumulation will not provide us with bread and roses too."

**CLAIRE MUMMÉ**, associate professor, Faculty of Law, University of Windsor

"*Law at Work* marks the culmination of six decades of labour law scholarship by Harry Glasbeek. He argues that law, and especially judge-

made law, plays a significant role in bolstering capitalist economies. Through the utilisation of the foundational doctrines of contract and property, which are largely the creation of judges, the law of employment reinforces the exploitation of workers."

**Ron McCallum**, AO, professor emeritus and former Dean of Law
University of Sydney

"*Law at Work* is a deeply knowledgeable reminder of what freedom of contract means for workers everywhere. A most readable history, its long view is also the kind of antidote labour lawyers need to imbibe as they grapple with the current pressures for protections to be weakened."

**Christopher Arup**, professor, Faculty of Business and Economics,
Monash University

"*Law at Work* illuminates how the law ensures the continued subjugation of contemporary labour. Harry Glasbeek makes clear that a legal facade of formalistic equality masks disparities of economic power and the concept of legal personhood privileges corporate 'individual' rights over workers' collective interests. These legal concepts provide the mythology behind the restrictions imposed on workers by contemporary statutory law."

**Gordon Anderson**, professor emeritus, Faculty of Law, Victoria
University of Wellington

"*Law at Work* provides a fascinating account of how legal constraints on worker and trade union power have contributed to a world of gross inequality of wealth. In a critique sweeping across many different countries, Harry Glasbeek shows that these constraints have long historical roots with their origins in legal hierarchies constructed before and during the Industrial Revolution. While acknowledging the various reformist agendas designed to ameliorate the degrading consequences of unbridled corporate avarice, in this compelling analysis Glasbeek brilliantly makes the case that the answer lies in replacing capitalism rather than reforming it."

**Keith Ewing**, professor of Public Law, King's College London

LAW AT WORK

# LAW AT WORK

## The Coercion and Co-option of the Working Class

HARRY GLASBEEK

Between the Lines
Toronto

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*To Sandra, my everything*

Some ideas are so absurd that only an intellectual could believe them.
—GEORGE ORWELL,
“Notes on Nationalism”

Not everything that is faced can be changed, but nothing can be changed until it is faced.
—JAMES BALDWIN,
*No Name in the Street*

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# INTRODUCTION

For thousands of years, workers have produced goods and services for themselves and others, sometimes being paid, sometimes not. But, for the most part, workers had few legally recognized political or social rights. Workers were not free, at least not in the way in which we describe freedom in our time. It was not until the late 1800s that the goods and services provided for others by workers in the Anglo-American jurisdictions (which are the focus of this book) could be labelled to be "free labour." Today, this slowly developed "free labour" is deemed to be an essential, an indispensable component of the variety of capitalism that has established itself in these jurisdictions. This book focuses on the ways in which law in these jurisdictions has moulded and shaped the nature of this "free labour," asking what it purports to be, might have been, and actually is.

Before we arrived at capitalism, there was feudalism. The movement to break away from feudalism took close to three hundred years before it became evident that feudalism had had its day, that a profound regime change had emerged. During this long period, workers' lives were controlled by their masters, by their lords. It made sense to have laws which could command them to work, for whom they must work, that permitted masters to punish them as criminals for being negligent or for refusing to abide by orders issued by masters. Even as feudalism was tottering toward its end, slavery was still permitted in Britain (whose laws and practices imbued those of the jurisdictions under examination here) and in its many colonies. Freedoms of the kind which we think of as normal today had no place in a system which explicitly gave legal rights to some and not to others, to owners of land (and to some very few specified others) and none or virtually none to all others. Workers' lives were truly miserable lives.

Eventually, a new set of relations of production did emerge. Historical developments are not linear and, necessarily, some of the characteristics and features of the prior order persisted. The passing of feudalism and clear

emergence of capitalist relations of production signalled, however, that in the main, the long, long period of unfree labour had been replaced by a system which was radically different. Now the conditions of producing workers were to be regulated by private contract-making, a scheme hailed as a great advance for the working class.

Elites and intellectuals jumped on the bandwagon as the new status quo was perceived to have been nailed down. Indeed, they seemed nonplussed by the fact that the merits and benefits of the new political economy had taken so long to be appreciated. By the middle of the 19th century, these gatekeepers were hailing the now established regime change as an inevitable and progressive change. In 1861, the English legal historian Henry Maine observed that what had occurred was a transformation of a system of social relations based on status to one founded on contract, that is, on personal choice and endeavour. This was an unalloyed good. Under feudalism, individuals' rights, duties, obligations, and privileges had stemmed from their relationship to landowners or to their attachment or lack of attachment to a merchant or craft guild. Their personal talents, their inherent drive and capacities, could not change their standing, their place in society. The fundamental change that the advent of capitalism had brought to individuals was that their talents and endeavours mattered. It was incontrovertible to the 19th-century observers: the turn to capitalism heralded the dawn of a new freedom.

This opinion became deeply embedded and, despite some increasingly discordant murmurs to the contrary, the prevailing view still is that capitalist relations of production are the terminus of political economic development, a final plateau. There is no need for theorists and malcontents to look for a new regime, no need to think about working toward a fundamental change in social relations. The system is widely believed to be capable of sustaining individual political and economic freedoms and producing material welfare better than any that went before it and better than any other that might be conceived. There Is No Alternative (TINA), proclaimed Margaret Thatcher. Intellectuals were eager to affirm this view. Thus it was that Francis Fukuyama's claim that the end of history has been reached was hailed as an obvious truth. Of course, the well-informed cheerleaders for capitalism are always mindful that, on the ground, things are not always what they should be. They, Fukuyama included,

acknowledge that, at any one time, the practice of capitalist relations of production may not deliver as much freedom or as much welfare as its logic promises. The early part of the 21st century appears to constitute such a moment.

There are an increasing number of anti-capitalist protests, many in very mature capitalist societies. These uprisings are spurred, in part, by the gigantic gains in income and wealth by the few and the corresponding stagnation of income and wealth for the many. A sense of being left behind by those who, only recently, had been reasonably well off, is common. In 2015, Oxfam reported that 62 individuals owned as much wealth as the poorest 3.5 billion people in the world; in 2018, Oxfam reported that a mere 27 billionaires had as much wealth as the 3.8 billion people on the bottom rungs of the world's wealth ladder. David Macdonald, the senior economist at the Canadian Centre for Policy Alternatives, reported that, in 2014, 86 people, 0.002 percent of Canada's population, had more wealth than 11.4 million Canadians. In Australia, Oxfam showed that the top 1 percent owned as much wealth as the bottom 60 percent of the population. A Global Wealth Report documented that three-quarters of the world's population owned less than 4 percent of the world's assets. And the well-known environmentalist and political philosopher Jeremy Lent claimed that 2,754 billionaires owned $9.12 trillion worth of assets, making them, as a group, the third-wealthiest economy in the world, behind only the US and China and ranking ahead of the combined gross domestic product of Germany and Japan. There are a host of like reports, leaving it undoubted that inequality has risen exponentially in the last two decades.

The wealthy are becoming more easily visible and are becoming a target for the dispossessed. As they protest, the afflicted hold the already rich culpable for the onslaughts (often dubbed "austerity measures") on workers' organizations and on the social wage and, therefore, responsible for the widening chasm between the few and the many. In its 2018 report, Oxfam noted that the wealth of more than 2,000 billionaires had risen at the rate of $2.5 billion per day. Oxfam calculated that, should governments impose a 1 percent wealth tax on these wealthy people, there would be enough money raised to educate every child in the world currently not in school and to provide health care services that would prevent 3 million deaths per annum. This is not happening. To the contrary: governments,

persuaded that there is no alternative, continue to cut the social wage of the non-wealth owners.

It is hard not to be aware of the palpably increased anger of large swaths of the population. This leads to earnest pronouncements about the need to make some adjustments. It is appreciated that social cohesion may be under threat. News reporters, academics, and political analysts publicly express the worry that austerity policies may give rise to potentially uncontrollable political backlashes, to revolts against the status quo which these worriers still believe to be superior to any other regime. This pushes some pro-capitalism advocates to plead for a return to more gentle capitalist days. They are thinking of the form of capitalism that emerged in economically privileged nation-states during the post–World War II period, a period which the economist Jean Fourastié revealingly labelled Les Trente Glorieuses. During that time, the working class's share of the gross domestic product grew to be greater than it is now. Both wages and the social wage kept pace with, or bettered, economic growth. It is logical, then, that the machinery used to mediate capital-labour relations in those days is looked to by some who want to avert the backlash to the current malaise. Other would-be saviours of capitalism do not think a mere return to the arrangements of those times will be sufficient to restore order. They see a need to turn to novel wealth-creation methods that would avoid the visible downsides of contemporary capitalism. They argue that non-wealth owners should be given a greater role in decision-making, that there should be a more inclusive political economy. But, of course, they do not envisage a regime that would fundamentally change things; they want to maintain and perpetuate the structure and ideology of capitalist relations of production, even as they avert some of the more horrendous outcomes of its natural workings.

These debates and discussions among some of the most respected guardians of the status quo are sophisticated and revealing. They demonstrate that it is understood, not only by affected workers but also by many perceptive capitalists, that the current dominant paradigm is not delivering as much material satisfaction, political freedom, or personal sovereignty as its many stout protagonists believe it should. Their integrity requires them to hang on to their convictions; they need to believe that this

is an aberrational moment which a few reforms could and should rectify. They are wrong.

The claim made in this book is that the promise that a capitalism based on private property rights and freedom to contract would set people free was always false and that those poor outcomes which we are currently seeing are not aberrational results but, rather, are built into a regime that inevitably reproduces and deepens economic, social, and political inequalities. The argument is that, inasmuch as the change from status to contract bestowed new freedoms, they were peculiar kinds of freedom for those who did not own any wealth other than their personal capacities. They had become free to sell their personal capacities, that is, their intellectual and physical attributes. They were free to sell part of themselves. Workers were thus empowered (a strange word to use in this context) to provide for their own needs. All they had to do was to hawk themselves in return for a wage. This freedom made it necessary for others to have the legal right to purchase their personal capacities. Those others were the owners of the means of production. Their purchase of what was on sale entitled them to use what they had bought as they saw fit, just as if it was any other commodity they owned. The purchasers were empowered (now the word seems more apposite) to deploy other human beings' talents and attributes to suit their ends, not to achieve the goals of those who possessed the talents and attributes. More, as Douglas Hay and Paul Craven document, from early on, the freedom to contract to sell one's talents was circumscribed by employer-favouring Master and Servant laws that gave the owners of the means of production even more bargaining power than their wealth already gave them. The free contract realm was rigged to favour the already rich. Put in these stark terms, it is clear that, from its beginning, the evolving freedom-to-contract regime was problematic. The liberty bestowed was, well, not so liberating.

To put it more bluntly: the implication of allowing would-be workers to sell their emotional and physical capacities to another, that is, to sell some of the very things that make each of them a sovereign, a special individual, entails the creation of a legalized right of the purchaser, of the would-be employer, to "lord it over" the seller, over the would-be worker. The somewhat jarring expression "lord it over" is used here to draw attention to a continuum between feudal relations of production and the capitalist

regime that slowly, but surely, came to replace it. From our contemporary perspective, one of the more brutal facets of feudalism was the legitimacy of the feudal lord to exercise authority over the bodies and minds of his subjects. The Master and Servant Acts provided a bridge between the old regime and the emerging one in that the right to subjugate freed workers to their non-feudal masters' demands permeated these statutes. If the claim was to be credible that contract-making should be welcomed because it freed people from the limitations imposed on them by the rigidities of a status society where their talents and capacities did not matter, the new regime should have jettisoned any notion that one party to the liberating contract should be deemed legally superior to the other when it came to the deployment of that other's talents and capacities. This did not happen and has never happened. To thinking pro-capitalists, this is a telling criticism of capitalism. They need a riposte and the more ingenious among them provide it.

An elaborate argument is proffered by capitalism's protagonists to the effect that what seems to be a modern (greatly softened, to be sure) replication of the feudal lord-serf relationship is not a legally imposed superior-inferior relationship of the kind that feudal law mandated. Rather, the arrangement between employers and their workers is the result of *voluntary* agreement-making between de jure equal parties to the agreement and, therefore, not offensive to the principles of freedom of contract and liberal philosophy. The influential conservative scholar Ronald Coase describes the employment contract not as one that hands unaccountable powers to the employer but as one that circumscribes those powers as the employee "agrees to obey the directions of an entrepreneur *within certain limits*." As will be seen in several of the chapters that follow, this is an implausible characterization of employment relations.

There is another difficulty to overcome for the defenders of capitalism as they claim that freedom to contract should be seen as a liberating concept. From the beginning, the understanding was that the product arising from the use made of the workers' talents and efforts belonged to the purchaser of those talents and efforts, that is, it became part of the assets, part of the capital, owned by the capitalist. Workers were to be alienated not only by reducing their capacity to determine how their personal abilities were to be deployed, but also by the denial of rights to the product of those

uses of their talents and abilities. It is natural that this alienation will produce resentment in the actual producers of goods and services. That kind of resentment, we shall see, was central to many historical struggles waged to resist the advent of capitalist relations of production.

In essence the argument that runs through this book is that we cannot look to the contract-based capitalist system to be a road to freedom, to self-fulfillment and contentment. Robust vestiges of feudalism remain embedded in the new regime. Social relations have not been completely transformed. Capitalists, driven by the profit motive, devoted to the private accumulation of socially produced wealth, depend on keeping the working class vulnerable and oppressed. This is an ideological danger to capitalism's relations of production as it seeks to retain its dominance, its hegemony. It may not appear to be as benign as its claims to enhanced liberty advertise it to be. Capitalism searches for, and finds, means to keep the overlap between the feudal status-based oppressions and contract-based freedom regimes out of sight. This work argues that law plays a significant role in these pro-capitalism politics.

This books sets out to show that the ruling concepts of property and contract are foundational ideas and that law embeds them in its version of the Rule of Law and the rules of law that implement it. In this way, law not only provides the basic needs of a capitalist system, but also makes those ideas and ideals commonplace, turns them into notions that are not to be challenged directly. Thus, not only does the law furnish capitalist relations of production with their structural needs, but it also supports them by making them ideologically acceptable. This is quite a feat.

The built-in inequality on which capitalism is based leads to inevitable resistance to the outcomes of bargains struck between owners of wealth and the propertyless. As already noted, periodically, in limited locales, the outcomes for those without wealth are not so harsh, and, for that moment in time, relative peace and quiet may reign. But sooner or later, the rapaciousness of those who own the means of production, aided by the privileges and advantages bestowed on them by law, leads to hardships that spawn angry reactions. This is why there is a never-quite-stilled threat to the legitimacy of the regime. For capitalism to be successful, shows of inevitable resistance have to be contained, relabelled, and marginalized. In addition to its structural and ideological roles, law comes to the rescue.

Instrumental laws are enacted (a) to facilitate and promote capitalism's workings and (b) to constrain its excesses.

Law has to fetter capitalists to some extent lest (to use a phrase used by Nick Hanauer, a self-proclaimed out-and-out capitalist) the dominated classes pick up their pitchforks and thrust them, pointy ends forward, at the privileged owners of wealth. There were (and are, as will be seen) many situations that raise this kind of anxiety. One old "for instance" is provided by Danuta Mendelson in *The New Law of Torts* (2007). She records that, in the mid-19th century (by which time capitalism was firmly in the saddle in the United Kingdom), 50 percent of children in some industries had lost fingers and/or had their hands crushed; by 1854, in some of the larger factories, up to one-fourth of employed children were seriously crippled or deformed. There are many modern equivalents, such as the horrendous toll exacted by asbestos poisonings or explosions such as the one at Bhopal in 1984, the collapse of an eight-storey building in Bangladesh's Rana Plaza in 2013, or lead or vinyl chloride toxicities, mercury spills, and the numerous deaths in mines and on oil platforms everywhere. These kinds of outcomes repeatedly call the regime's legitimacy into question. Efforts to avoid these revelatory failures must be seen to be made. Any such exercise has to marry several competing objectives. Law has to encourage private wealth owners to invest their property to generate more wealth; it has to pacify non-wealth owners by restraining capitalists but not so much that it discourages them from investing and, more importantly, not so much that it brings into question the fundamental right of private property owners to do as they choose with their assets, or not so much that it might erode the sanctity of voluntary contract-making. In sum, to help capitalism, law needs both to promote and restrain the animal spirits that animate its capitalists, a delicate task.

Governmental interventions that fetter the right of the owners of the means of production to do with their property as they choose are portrayed and are largely seen as unnatural or, better, as shackling *natural* freedoms. They need to be justified. Thus it is that most restrictions are imposed when the harms inflicted by profit-chasing capitalists are grave and have become embarrassingly visible. At such moments, capitalist activities become politically damaging. The government's intervention is often focused, almost laser-like, on the most recently revealed troublesome sore spot.

Frequently, then, the scope of regulatory protection is limited to specific people or groups. For example, the plight of children reported by Mendelson led to early legislative protection for children, not applicable to adult males (although equivalent ones were designed somewhat later to safeguard adult women). This leaves many similarly placed people who do not fall within the definition of protected zones or activities as "unregulated" producers of wealth, that is, they remain unprotected by positive, interventionist laws. The contention in this work will be that this non-protection, too, is a form of regulation: these workers are thrown onto the mercy of unfettered or less fettered capitalist relations of production as constituted by law. The existence of such "unregulated" spheres helps owners of wealth to exercise more power over all workers. Law's burdensome task is to make all this look normal, natural. The argument here is that this forces law to distort itself, always leaving it open to victims of capitalism to argue that it is an unjustifiable regime.

*Law at Work* contends that we cannot look to the contract-based capitalist system to be a road to freedom, to contentment. It has not been that because, at its core, it entails oppression and alienation. It cannot be meaningfully reformed, as the many efforts to ameliorate its adverse impacts and subsequent manifestations of their failure illustrated in this work will show. The conclusion is that, as law is designed to keep the scheme in place, the mitigating and legitimating reforms it periodically offers are always limited ones. They embed the very assumptions and beliefs that capitalism needs to thrive. The chapters that follow—and the accompanying online notes—are written, then, to argue that legal reforms are not enough: the regime needs to be rejected if human beings are to attain their full potential as sentient beings.

For full expository notes to each chapter, please visit btlbooks.com/book/law-at-work

PART I

# *Capitalism's Legal Framework*

Wherin a bird's-eye view is offered about the role that the law, its functionaries, and its institutions played in creating the current state of capital-labour relations. Law played a part in, first, establishing the foundations for capitalism and, then, in moulding the necessary mediation. Law's legitimacy gave ideological support to the rules and principles which flowed from these structural starting points. And law became a terrain of contest as, *within this framework*, the employer and working class fought for rules and principles which would tilt the terrain of the unavoidable struggles toward them. The combatants fought over the instruments of law which would best suit them. These struggles often took the form of bloody wars, physical battles which spoke to the deep class conflict embedded in the legal rules of private property, contract, and individualism which characterize capitalist law. For a while it seemed that, after much hardship, workers were making legal progress.

CHAPTER 1

# *From status to contract: Toward new legal forms of worker subjugation*

During the long feudal period, an outbreak of bubonic plague, better known as the Black Plague, devastated England. Somewhere between 30 percent and 50 percent of the population died. This led to a rare enactment of a statutory law, *The Statute of Labourers 1351*.

A shortage of workers had instilled in the then masters of the world the fear that it would cost them a great deal more than usual to get work done by the only class of persons who were supposed to do it. Any gains they made would come at the expense of the non-labouring classes. The 1351 legislation set out to prevent this. The statute spelled out, with great precision, those people whose relationship to power identified them as workers and servants. They were people who had no means or land of their own or who did not belong to merchant or craft guilds. They were not to be protected; to the contrary. The legislation said that their status meant that they *must* work for people of higher status who demanded they do so and that they must do so at wages that were well below those that would obtain if they had been allowed to exploit the fact that so many potential workers had died or were sick. The maximum wages they could expect were the wages that had prevailed during a serious economic depression following the Hundred Years War. The King, the prelates, the nobles, and the learned assistants also understood that the plague-induced scarcity of low-status would-be workers and servants meant that some unfortunate masters might not find anyone to do their work. Such bereft masters might well be tempted to entice some workers away from other masters by offering them better conditions. This might destroy the carefully crafted wage-depressing system. It was, therefore, made a crime, both for workers and for their

enticers, to give in to this temptation. I will discuss the persistence of this primitive, pernicious, feudal idea many times. The repression of the weak retains its appeal even in these supposedly more enlightened times.

Manifestly, forcing people to work for others in conditions they had no part in choosing, and to prevent them from leaving the cages in which they were trapped, was oppressive. Yet, in a system of social relations in which an individual's rights, duties, privileges, and obligations were intertwined with one's status, with one's relation to land ownership and tenure, with one's relationship to special organizations, such as merchant and craft guilds, *The Statute of Labourers 1351* was logically defensible. After all, it subjugated lesser-status people to the wishes and needs of those who ranked above them in the legitimated social and economic hierarchy. This is how things were meant to be.

This kind of machinery to control wages and prices to suit the reigning feudal lords and masters was used many more times in pre-capitalist days. The historian Samuel Cohn reported that many similar statutes were enacted in other European countries. Unsurprisingly, the targeted workers and peasants rose up against these oppressive laws on many occasions. The fierce fight to defeat *The Statute of Labourers 1351* is now known as the English Peasants' Revolt of 1381. The many other instances of extra-legal rebellion over the next few centuries are persuasive testimony that the subjugated classes were most unhappy with the feudal yokes that choked off their aspirations. They should have welcomed capitalism, a new way of doing things. Yet, as it turned out, they did not much like the changes on offer as feudalism neared the end of its reign.

The people who had suffered from being subjugated to feudal lords and barons also had benefited quite a bit from a culture and practice of a kind of symbiotic paternalism. Their deprivations arising from their status had been alleviated by having access to what were called the commons. They had been allowed to feed their animals on what was other people's land after the harvest had been collected or just use waste land to do so; they were allowed to collect material for fuel, to pick up and keep for themselves such grains that had fallen during harvesting. This helped them maintain subsistence levels of welfare. But, as feudalism was slowly unravelling and agricultural practices were changing (forcing agricultural workers off the land), their access to the commons was denied. The enclosure of previously

shared lands and things on them, by the use of private force and public laws, was integral to the development of early capitalist relations of production. It became increasingly the case that the land-poor were forced to find other means to provide for their well-being.

“Freed” from their bonded agricultural and domestic services, they were being pushed into the townships where new industrial production was taking off. They discovered that the wide gulf in wealth that had existed during the feudal period persisted: a few people in the land continued to control most of the assets. For those without wealth of their own, it was far from obvious that the ongoing demise of feudalism and the accompanying promise of newly gained legal sovereignty was going to make them equal, make them more self-sufficient. What they saw and felt was that, as they were being forced to compete with an ever-increasing number of needy people of their own class, they were being freed to sell what they had to offer at very low prices. From this perspective, things were not looking too good.

The parlous economic and political conditions endured by the new working class throughout the late 16th, 17th, and 18th centuries made its members the subject of derision and opprobrium. The English historian Christopher Hill details the way in which work for wages was perceived as it became more central to productive activities. He cites J.U. Nef, who observed that when, in the early 17th century, a new industry came to a township, the workers were seen to be scum and dregs to be rejected by decent society. There was a saying that there was nothing more contemptible than being a worker for wages, except, perhaps, to be an employer of a worker for wages. The Levellers, the radical political activists of the 17th century, argued that wage-labourers should be excluded from any voting franchise that might be established because they were not truly free men. For the developing work-for-wages class, it was a bad time. Not only were their working conditions poor, their social and political status was perceived to be a degraded one.

It is not surprising, then, that many workers vigorously resisted their new “freedom” to enter into work-for-wages contracts. This point should arrest the attention of modern readers. Today, many members of the working class are begging for the opportunity to enter into such contracts. It was not always thus. Are the conditions under which these contracts are

negotiated so much better now? Is it no longer the case that workers and would-be workers are politically handicapped, that they are economically oppressed? I shall return to these questions in later chapters. I will argue that, while there have been many improvements, there are also many ghosts of the dark past that haunt the working class today. For the moment, let me go back to the 18th century, when it was becoming clear that there was no going back: capitalist relations of production were here to stay.

Far from happy with their freedom as workers to sell capacities and talents in a competitive market, one of the working class's responses was to reach back to the laws that had regulated the later stages of feudalism and early mercantilism. In the 1700s, workers, seeking to avoid the impact of supposedly liberating contract law, looked to the *Statute of Apprentices*, a statute enacted during Elizabeth I's reign in 1562. It had its roots in feudal relations of production, even as it was taking cognizance of profound changes. That law had been enacted after another debilitating epidemic had taken a toll, albeit not one as ravaging as the Black Plague. There had been, once again, a shortage of labour, and it must have seemed natural to the law-makers to replicate some of the measures of *The Statute of Labourers 1351*. As already noted, this approach to policy-making had become embedded in conventional feudal thinking.

Thus it came to be that the *Statute of Apprentices* of 1562 contained many of the Black Plague law's features. Just as the 14th-century law had acknowledged the special place of merchant and trade guilds, the 16th-century statute provided that, where specified trades had carved out an established niche for themselves, members of good families could become members of that trade by serving an apprenticeship. Trades had relative monopolies in identified geographic zones and could dictate prices to the people who needed their products or services. The apprenticeship system enabled them to exercise control. The number of new entrants to a trade were limited, and the length of an apprenticeship (typically seven years) helped curb the number of qualified people who could seek employment within any one trade in a given geographic zone. These statutory provisions offered the existing and potential trade members some very real benefits. More, as protected trades, these trades' members had direct links to the markets for which they produced their goods and services. There was no intermediary financier/capitalist to take a portion of the proceeds or who

had an interest in regulating and controlling the trades' modes of production.

The Elizabethan statute was not so benign when it came to other workers. Section 15 dictated that justices would set the wages and conditions of work (including the number of hours) for all other categories of workers, including labourers and those engaged in husbandry. As the justices were drawn from the ranks of the dominant class, this was a serious brake on workers' hopes and desires. The chief criterion guiding the justices setting the conditions of work was "the scarcity or plenty" that prevailed at the time of decision-making. If at all physically able, individuals between the ages of twelve and sixty were obliged to work; unmarried women under the age of forty could be compelled to become servants. To make matters even more dire for the regulated working class, the legislation, like the 1351 Black Plague law, made it a criminal offence for employers and employees to enter into agreements that would pay workers more than the rates set by the justices. Not much freedom in any of this!

Worse: the statute restricted the right of workers to move away from where they were employed under pain of penalty. This aspect of the law was given more scope and power by other legislation enacted by the Tudors, who were busily designing what we would now call a national labour regulatory scheme. Reference is being made here to the Poor Laws. Thus, the *Poor Law* of 1601 instituted a regime that lasted for 250 years and that was intended to make local parishes responsible for their populations, in part, by directing them to look after them and, in part, by preventing them from passing the problem of needy people on to other parishes. Restriction of labour mobility was part and parcel of those legal regimes. The most notable of these restrictions on mobility were found in the *Poor Relief Act* of 1662, known as the Act of Settlement.

The Poor Laws varied in details over time, but their objectives were constant: to subsidize those who could not be made to work because of their incapacities and, as the *Statute of Apprentices* did, to force all others (including children whose parents could not look after them) to work if they were to get the benefit of support from the local authorities. There was an initial period during which workers were eligible to get relief from their local parish, provided they satisfied the criteria of incapacity and indigence

and settlement in the area. This relief was granted to them if they stayed in their residences. It led to much litigation about eligibility to relief in any one parish, and, in addition, it inhibited the free movement of labour, an anti-market, anti-free-contract outcome. To confront these problems, new Poor Laws were enacted, establishing workhouses for those who needed assistance. It was made easier to ensure that the recipients of relief were eligible and that those who were capable of work would work. The associated oppressions and deprivations became the subject of much anger and adverse commentaries.

One reaction, one which spread like wildfire throughout the UK, was the Speenhamland regime established in Berkshire. In part, it was intended to counter some of the difficulties spawned by the enclosure movement. One of these was that remaining farmers who had difficulty finding labour as would-be servants were driven into the industrializing cities. As well, as the war with France ended, inflation took off. Workers paid on the old scales were unwilling to continue to serve. The Speenhamland scheme set out to alleviate the labour problems that had arisen. Central to the Speenhamland system was that workers who remained with their employers would have their wages topped up by the parish to counter the erosion of their wages by inflation. The formula for top-ups was based on the price of bread and the number in a family that needed bread. Relief was now outdoors again (that is, benefits were not conditional on workhouse relief). Badly needed workers were less easily disciplined by their employers. On the other side of that coin, employers had every incentive to keep wages as low as possible, knowing that the parish would ensure the subsistence level rates workers needed. For the farming employers this, plus the retention of workers, was a boon; to other potential employers the lack of mobility of workers signified a reduced competition for jobs, a competition which could help them push down on wages and conditions of their existing workforces. For the parishes, it meant an ever-increasing pressure on their revenues.

These duelling pushes and pulls led to calls for major reforms. After yet another public inquiry in 1832, a new statute emerged, the *Poor Law 1834*. Its emphasis was that the costs of the legislative workhouse schemes and the Speenhamland regime had become too great a burden on the public purses and had also encouraged idleness. Too many indigent people did not

feel any great pressure to work. This Act set out to remedy these problems. Principally it did so by centralizing the system of relief, creating uniform rules, a scheme of annual reports, reinstitution, and strengthening of workhouses, reducing aid to vagrants and potentially capable but non-working persons, getting rid of all outdoor relief, including the Speenhamland operations, and, above all, ensuring that the non-working poor received less than the labouring poor. Administrative tightening and a system of less eligibility, one in which even very badly paid workers were to get more than non-working paupers got from the relief system, were the keys.

Let me indulge myself with another aside: readers will undoubtedly note that this approach inheres in many of our contemporary social welfare schemes which deny benefits to claimants who do not do their utmost to find other means of survival. Once again, this raises the question as to how far, conceptually speaking, we have come. But let me leave that for the moment and concentrate on the way in which the new relations of production were perceived by workers when they first had to deal with their advent.

The workhouses' conditions were so bad that workers were being driven to offer themselves to any outside employer on almost any terms. The notion was to make pariahs out of those who could not support themselves in any way whatsoever. While they were not actually left to starve, Benjamin Disraeli, a Conservative prime minister of England, wrote that the introduction of the *Poor Law 1834* "announces to the world that in England poverty is a crime."

It is to be noted here that it was not until 1772 that slavery in England was ended by Lord Mansfield's decision in *Somerset's Case*. For a long time, slavery had existed side-by-side with the Poor Law system, with its power to force people into the work-for-wages sphere. It is not hard to imagine that labourers did not feel themselves to be truly sovereign individuals in that kind of polity. This sense of demeaned autonomy was undoubtedly exacerbated because the employing class, always searching for disciplinary powers to govern its workforce, had used newly won voting powers to have the legislature enact what turned out to be a series of draconian general Master and Servants Acts in 1747, well after the Poor Law system had come into being, sharing some of its goals. These Master

and Servant laws forced workers to remain employees once they had entered into a contract of employment. Punishment for disobedience included jail, and whipping was not unknown. There was a series of such statutes and, by 1823, they covered virtually all manual labourers. Their contracts might be for a year, a month, a day, but in all cases workers were not entitled to wages if they left earlier than that without permission. Criminal charges could be laid for leaving or being absent without permission, as well as for misdemeanours and negligent behaviour. This made it even more difficult for workers to organize themselves and to strike than the common law already made it. I will return to this point. In the meanwhile, note that, while courts would no longer have any truck with slavery, laws were promulgated that gave employers powers that approximated those of slave owners. In his 2023 “Wage Labour,” Hay observes that, in the early nineteenth century, workers compared their lot to that of slaves in the British colonies and “looked enviously to the United States” where white workers rejected penal sanctions. The one-sided nature and intent of the British Masters and Servants regime was underscored by the fact that, should an employer not have paid wages that were due to workers or who had been dismissed without being given the legally prescribed notice, the workers could recover the monies owed by obtaining an order from a magistrate, but no criminal charges were to be laid against employers. Employer misbehaviour was not to be criminalized easily. The parties to a free contract of employment were not dealt with even-handedly by law.

The story thus far: as feudalism was ending, laws reflected a determination to cast non-property-owning people as a class that needed to be subjugated to the needs of wealth owners chasing more wealth, even as, in principle, law endorsed the freedom-favouring concepts of voluntary contract-making. Needless to say, legislation that privileged the employing class so disproportionately was resisted.

As I will detail briefly below, workers began to win some countervailing electoral rights. Gradually, some of the more heavy-handed criminalization of worker violations of terms and conditions were removed by legislation. By 1867, imprisonment was reserved for egregious misbehaviour by workers, leaving the employer with the right to have fines imposed and/or to seek damages from workers. That 1867 Act proved to be

the last one of the Master and Servant enactments. But the way in which the Master and Servant statute characterized the relation between capitalists and workers haunts us to this day, not just in England but in all of its former colonies, which combined wording from British statutes with their own harsher terms and penalties, especially for imported workers. They remained operational long after 1875. During their English reign, the Master and Servant Acts had made the intimidating and repressive nature of the punishing Poor Law schemes more effective than they would have been as stand-alone ones. This pressure to push down on the emerging working class was a coordinated constant from the moment that capitalist relations of production emerged from their feudal beginnings.

The earlier sketch of the legal position in the late 16th and early 17th century made the point that, around the birth of capitalist relations of production and for some considerable time thereafter, the law governing work relationships bore many of the imprints of feudal relations. It is likely that the law-makers were well aware of the gradual unwinding of the feudal estates and of the flow of dislocated farm workers into towns, as crop growing gave way to sheep farming, and that this was a social threat. It was increasing the number of people who had no identifiable masters. This presented a novel set of problems to what had been a tightly controlled status society. Writing a century after the passing of the *Statute of Apprentices*, Thomas Hobbes observed that the fear had been that masterless men might not be, as they should be, subjected to the discipline of authority or laws. The Elizabethan measures focused on maintaining social order as they regulated labour markets. The 16th- and 17th-century statutes ensured that everyone not in a recognized trade would have a master by mandating forced labour and by imposing very severe restrictions on the mobility of workers, whose wages and conditions were to be tightly controlled. At this stage, the legal system did not reflect the principles and ambitions of a liberal polity or a liberated economy. It was a system of restraints. These restraints both aided and hindered capitalists.

To some of the new industrial enterprisers, the restraints were anathema, not because they kept workers subjugated and in serf-like conditions, but because they hindered competition. They created inefficiencies. The lack of mobility depressed competition among workers, denying employers access to the largest possible pool of labour with appropriate skills; the *Statute of*

*Apprentices*' protection given to trades by their control over a specific occupation was a blot on freedom to trade; the rigidity of the apprenticeship requirements was inefficient. By the last third of the 18th century, no less a person than Adam Smith complained about the control exercised by trade guilds and their apprenticeship system, which, he believed, was totally unjustifiable. Insistence on a seven years' apprenticeship to learn a trade's skills that, he thought, often required no more than a few days to learn, was simply insupportable. The lack of all other workers' mobility also hurt workers, as they could not take their talents and capacities to employers who might be willing to reward them better than those where they were stuck. These kinds of arguments found more and more support as both agricultural and industrial requirements changed, as the very nature of social relations changed. Some eighty to a hundred years after the *Statute of Apprentices* was passed, it had lost much of its sting: it was applied to a shrinking portion of the workforce. Courts interpreted it as not intended to cover the many new industries and occupations that were emerging in the quickly changing economic and technological era. New trades and industrial occupations such as, say, the new cotton industry and associated activities, were not subjected to the Elizabethan statute's decrees. More and more workers were freed to sell their capacities and talents in markets that left them vulnerable to exploitation. The governing law was still on the books, but its coverage of conditions and terms of the workforce was declining year by year.

This "liberation" was not all that attractive to workers. As more and more were forced out of the ambit of the Elizabethan statute, they came to be governed by the logic of the developing law of individual contract-making and subjected to the Poor Laws and the Master and Servant regimes. Even though the 1562 Elizabethan law treated many workers as subjugated, non-autonomous individuals, many workers sought to have themselves re-regulated by those restrictive laws. Alfred Henry Ruegg, a judge and author, reported that some 300,000 people—a staggering number given the population, the difficulty of communication, and the relatively low rate of literacy—signed petitions to have the *Statute of Apprentices* applied rigorously. As late as 1811, the workers of Kent went to court to apply for an order to have justices of the peace meet to impose the wages and conditions that ought to govern their employment. The judge, Lord

Ellenborough, undoubtedly aware of the anachronism of having a feudal-type law on the books in a capitalist economy undergoing the momentous changes of the first Industrial Revolution, finessed the issue. He acknowledged that the still-valid law postulated that the justices had to meet to consider wages and conditions, but that it did not explicitly say that they had to make a ruling. I will present examples of this kind of judicial chicanery in later chapters; it is known as clever lawyering and it is nearly always put to work to suit the dominant class, as it was in this case. In the result, by 1813, it was all over for the *Statute of Apprentices*. It was repealed in 1875.[1]

These attempts to look back to a worker-unfriendly statute to avert the outcomes of a notionally freedom-enhancing individual contract-making regime had not been the only response made by workers and previously self-governing trades. They understood that their increasingly parlous straits stemmed from there being too few would-be employers and an exponentially growing workforce. As the nature of farming changed to meet the demands of the new wool industries, people were driven into the cities. During the same period, the routes to entry to self-protecting trades with direct access to markets were being cut off, while changing technologies pushed production modes into repetitive, relatively unskilled tasks. These developments made more and more workers available to would-be employers. As they were being forced to compete with each other for jobs and their numbers grew and grew, nothing but misery awaited them. This led to two main strategies, both of which, tellingly to the subject matter of this book, remain central to workers' resistance today. The continued relevance of these strategies suggests that, despite the waging of many successful struggles, the essentials that make workers vulnerable to capitalists' power have remained largely intact.

## UNIONIZATION

The first of the workers' strategies was the formation of unions. In any one geographical area workers, who normally would have to vie with each other to find employment in a certain industry, struck agreements in which they promised each other that none of them would accept an offer of lesser wages, terms, and conditions than those offered to any of their fellow members. In this way they sought to eliminate competition among

themselves. Law, wedded to individualism and freedom of economic activity, did not look kindly on these efforts to stymie competition. Late 18th- and early 19th-century English legislation made it a criminal offence for workers to combine to form unions and to strike. But, legal or not, workers had few options and, despite the many threats of punishment they faced and the many harsh penalties actually imposed on them, they persisted. Slowly and haltingly, the political scene changed and workers obtained limited permission to engage in collective actions. Trade unions won protection for their organizations' property, something they had not been afforded when they were deemed totally unacceptable. And, while any agreements they reached with employers could not be directly enforced by the unions, it had become acceptable for them to bargain on behalf of their members. Facts on the ground and militance had forced legal and political changes. Under political pressure, legislation had been enacted to curb the judicially crafted common law that had been so enamoured of individual contract-making.

These legislative reforms were political compromises. They did not amount to a conceptual rethinking. Even if facts on the ground had forced the law and the elites to tolerate the combinations of workers *to some extent*, they were still perceived as ideological misfits and as legal abnormalities. The remedial legislation defined trade unions as organizations in restraint of trade and offered them very limited legal protections. The signal was that the acknowledgement that unions were here to stay had been granted grudgingly and that, should unions push their new legal standing too far, it would be appropriate to rein them in. Inevitably, the judiciary, the principal guardian of individualism and free contract-making, exploited this potential.

Courts held that, while workers acting as collectives, as unions, were now entitled to bargain about their conditions of employment, they had to do so gingerly. If there was evidence that they desired to injure the employers when seeking to benefit from bargaining and/or used any tactics that might be illegal (such as trespassing on land or blocking a path), they faced the possibility of being charged with criminal conspiracy. These open-ended limitations threatened to undermine the hard-fought-for partial legalization of trade unions, and unions had to agitate for further statutory reform. They were successful but, once again, the remedial legislation was

just that: it did not do away with the structural and ideological constructs propagated by the courts. This meant that judges felt themselves bound to read statutorily created collective workers' rights as narrowly as possible. Courts proved themselves innovative as they fashioned novel ways to protect individualism in the face of legislation promoting some measure of collectivism. The see-saw between judicial promotion of individualism and partial protection for collectivism by legislatures continues to this day, precisely because the political institutions will not do away with the judicially designed structural framework that is extremely useful to capitalism. As will be shown in later chapters, workers make step-by-step inroads on the sway of the individual contract-making regime, but, all too often, some of these gains are rolled back as the employing class is able to resort to demands that the never-rejected logic and moral standing of individual contract-making has to be respected.

This has brought us to a consideration of the (intimately related) second major strategy employed by workers, namely their use of the vote.

## ELECTORAL POLITICS

As noted above, it was not until well into the second half of the 19th century that legislation was enacted that gave trade unions some foothold in the legal system. Ere this partial relief came, workers acted extra-legally. They were punished for speaking out, for combining with others, for meeting in taverns to talk about their common plight, for doing absolutely anything that might threaten the well-being of the owners of the means of production. The employing class wanted to confine workers to being allowed to sell bits of themselves, to enter into individual contracts of employment where employers, as members of the wealth-owning class, had the upper hand. This was the context in which workers tried to unionize, even if it meant violating existing laws. They needed to eliminate the disadvantage created by the huge pools of competing necessitous workers available to would-be employers. Just as workers tried to offset the handicap of being too numerous by creating unions, they understood that their abundant numbers might, in another sphere, be used positively. They sought the vote in order to win representation in parliament, something the far less numerous property-owning class already had.

In England, as capitalism emerged from feudalism, would-be entrepreneurs, would-be capitalists, militated for governments that would no longer have the absolute powers sovereign feudal overlords had had over individual wealth owners. They demanded that they should be allowed to act on the right they claimed free property owners had always had, namely to speak freely, to enjoy the many political rights that belonged to the owners of wealth as nature had intended. No individual should be left in a position to curb these claimed rights. To this end, they had to overthrow the existing legal institutions of the day. They felt entitled to do so by any means whatsoever, including ones that were illegal at the time. Their success in limiting monarchial power after waging a civil war (1642–1651) led to a settlement that endorsed the freedoms and liberties claimed by property owners (legally finalized after the Glorious Revolution, 1688). They won a form of government that took away monopoly powers from monarchs and lords and claimed those powers for a government that they, and only they, would elect and that, therefore, they could count on to represent their interests and only their interests.

Now, capitalists, that is, those who privately appropriate socially produced wealth, are always few in number. Those who have to sell their labour power to those capitalists and their dependants comprise the bulk of the population of any capitalist political economy. This is why, originally, capitalists and their political allies denied the right to vote to non-wealth owners. The power of numbers was not to be given any weight. The numerous, that is, workers and their allies, fought to change this. Like the property owners (and freedom fighters like the Levellers when they had claimed their civil liberties during the 17th century), workers and their supporters had to defy existing laws as they pursued voting rights. In order to advance their claim to be given the franchise, they needed the ability to speak, to assemble, and to associate freely. They had to fight for what we now term political and civil rights to get meaningful voting rights. They frequently fell foul of the laws of the day and suffered hardships. In short, law was used to repress workers' and unions' rights to improve their bargaining position vis-à-vis capitalists already armed with legitimated law-making powers. E.P. Thompson has documented the many punishments imposed on the working class, including the execution of activists, the penalties imposed on unions and their members by courts and by the

enactment of statutes that left them less than well protected, the defence of enclosures that so disadvantaged workers, the non-prosecution of those who used force to repress workers' demonstrations …

Capitalists understood that widening the franchise so as to include their class adversaries as participants could undermine the great advantages obtained by having the electoral process available only to the owners of wealth. They were fully conscious of the fact that this might threaten their privileges. In his *Development of Parliament during the Nineteenth Century*, G.L. Dickinson reports that those who resisted the widening of the franchise argued that the danger of allowing the masses to vote was that they would follow socialist teachings. As they made so little, they likely would favour a graduated income tax; they would promote legislative protections for workers, including putting limitations on the hours of work. These fears, augmented by the popularity of the Chartist movement and by the appearance of the *Communist Manifesto* in 1848, motivated capitalists to find ways to limit the powers of the numerous.

But the tide could not be stopped; it was merely slowed down. Gradually, the owners of the means of production had to make concessions and, bit by bit, workers found themselves in a position to influence legislatures into protecting them from the harshness of the ideology of freedom-of-contract doctrines, framed as they had become by the hurdles to be cleared by unions, the system of Poor Laws and Master and Servant laws.

The working class made progress but did so unevenly, and such progress never became immune to reversal.

## SUMMATION

1. The protection of private property as a neutral fact of life, which was not to be taken into account when property and non-property owners engaged and clashed with each other, turned the contract of employment into an agreement that had to be honoured by law, as it was a voluntary agreement between *legal* equals. Now much-heralded as progress because it gave one and all the capacity to make the most of their opportunities by deploying their talents and resources as they saw fit, it was heavily weighted to favour those who owned the bulk of the wealth.

2. This would have been so even if nothing else happened to affect relations between the wealthy and the working class. But the owners of wealth, the employing class to be, while in favour of a system that gave non-wealth owners the right to sell their talents, wanted to ensure that this buying and selling would take place on terms that suited them particularly well. While the *principle* of free contracting was to be acknowledged to be an unqualified social good because of the respect it accorded one and all, what was, and is, always contested is the setting in which this free contracting is to take place. They who control the moulding and shaping of the setting in which "free" contracting is to take place are able to put themselves into the driver's seat. To state and emphasize the obvious: markets are constructed; they do not exist in a vacuum.
3. When the *Statute of Apprentices* no longer suited the emerging capitalist class, it was attacked (and finally abrogated) in order to give employers greater choice, to force more competition among workers. Workers struggled to halt this "progress" as the rather sparse protections the old statute provided helped them to ward off the impact of debilitating competition for jobs. Simultaneously, they formed unions.
4. Workers, like employers, were fighting to reconstruct the labour market. Both sides fought in the judicial and legislative spheres to advance their cause. For a long time, employers were on top.
5. Master and Servants acts maintained and increased employers' power over workers, both in England and in its former slave colonies. When Poor Law regimes were instituted to help those incapable of surviving without assistance, employers fought to make sure that those relief systems did not impair the maintenance of the hyper-competitive labour markets that they preferred. If this meant that vast numbers of people would suffer indignities, deprivations, and general misery, so be it. As historian E.J. Hobsbawm notes, "the Poor Law was not so much intended to help the unfortunate as to stigmatize the self-confessed failures of society."
6. Today's unquestioned and unquestionable starting point, namely that freedom to contract in a private property economy is desirable, in no way signifies that well-being and liberty will be attained. Outcomes depend on the construction of the markets in which property is deployed and on the

way in which “free” contracting is to occur. In a class-divided society, these struggles are never fully settled.

7. As Marx observed: “It takes centuries ere the ‘free’ labourer, thanks to the development of capitalist production, agrees, i.e. is compelled by social conditions, to sell the whole of his active life, his very capacity for work, for the price of the necessaries of life, his birthright for a mess of pottage.” Naturally, the working class is continually trying to find a better way of living, in a ceaseless search for autonomy and self-respect.

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CHAPTER 2

# *Capital-labour struggles better described as wars*

From the mid-19th century onwards, unionization and enlargement of the franchise in the Anglo-American jurisdictions put some curbs on the employing classes' previously virtually unbridled economic power. Those changes, however, did not become all that deeply embedded.

This became apparent during the onset of the Great Depression in the late 1920s, as workers rapidly lost a foothold on such security and relief from misery as they had by then won. The impacts of this profound economic downturn were felt for more than a decade. The suffering, the hunger marches, the political unrest, the immiseration of that period have all been chronicled by historians, journalists, novelists, poets, and filmmakers. Literally millions of people were rendered destitute and desperate. For capitalism, it was a moment of danger, as it was seen to be failing, spectacularly. As the workers' frail defensive institutions, most notably trade unions, were being smashed, workers were forced to stand naked before the owners of wealth who, desperate and frantic, mercilessly sought to continue to get the biggest bang for their buck. In their anarchic drive for profits, these self-seeking capitalists were making it harder than ever for workers. The circumstances of the working class were parlous. Economists—most famously John Maynard Keynes, whose explicit purpose was to rescue capitalism—argued that private capital could not save the day. Governments should pick up the slack and pump money into the economy. They should jump-start economic activities even if that would push their budgets into the red. Economically, there was a need to strengthen the working class and, politically, there was palpable anger to be stilled. The US, where the Depression bit more than most equivalent places,

provides the best-known illustration of the dramatic reactions to these pressures.

As part of what was tellingly called the New Deal, the US government introduced legislation that would give workers newly legalized countervailing power. Processes facilitating unionization and requirements for employers to bargain with the unions so as to reach enforceable collective agreements were put into place by the Wagner Act. The purpose was twofold: first to make it easier for workers to offset the power of employers and, second, to improve the aggregate demand for goods and services. The hoped-for heightened demand would then give the owners of the means of production the incentive to invest in productive activities. Given the theme of this book, it is useful to see how capital reacted to these innovations.

There had been earlier attempts to engineer schemes akin to the one that became enacted in the Wagner Act in 1935. These earlier efforts were limited in scope and nature because employers did not want to accept any rule that would force them to negotiate with workers and/or their representatives. Such compelled and unnatural bargaining, they argued, offended the principles of freedom of contract. They were able to use law's anti-collectivism in support of these contentions. To ward off these rather successful legal employer strategies, the US government was goaded into passing the Norris–La Guardia Act. Its purpose was to make it harder for employers to go to the judiciary to constrain workers' ability to use collective bargaining powers. Despite this, the early legislative attempts to promote unionization and collective bargaining failed, as employers remained recalcitrant and they had little to fear from the feeble enforcement mechanisms that were intended to safeguard the new workers' protections. Here it is significant to note that the employing class was willing to foil and, if necessary, to violate properly passed laws.

These failures of earlier legislation, plus some very large strikes which included city-wide stoppages and factory occupations, forced the legislators' hand and the *National Labor Relations Act* (the official title of the Wagner Act) was the result. Like the earlier ineffective statutes, the Act provided that workers should be allowed to form their own organizations without interference from their employers, and that employers would have to enter into negotiations with unions in good faith to reach enforceable

collective agreements. Its improvement on the earlier statutory schemes was the establishment of an independent oversight administrative agency, the National Labor Relations Board. It was endowed with powers to ensure compliance and was expected to exercise those powers. This turned out to create a new ball game. But not instantly.

The scheme, as expected (and as readers might expect by now), was opposed by the dominant forces of the employing class, even though it was put forward as a means to rescue capitalism. It is useful to remember this: while all capitalists benefit from the maintenance and perpetuation of capitalist relations of production, the logic of the system is that each and every capitalist is expected to look after their own interests. Capitalism is a system but capitalists, its principal actors, are atomistic, anarchic by nature; they do not, and are not expected to, feel any responsibility to capitalism as a system of social relations.

Thus it was that, once again, employers looked to the judiciary to see whether they could beat back the legal advance proffered to the working class by the legal instrument known as the Wagner Act. The legal fight-back rested, as always, on the unacceptability of legislation that put fetters on the deployment of private property and on individual contract-making. This time, in a 1937 decision by the Supreme Court of the United States, the employers lost. There was, to be sure, no explicit ruling that the quintessential capitalist arguments about the sacrosanct nature of private property and of freedom to contract as individuals were to be abandoned. The US Supreme Court found less system-threatening, but legally plausible, reasons for its declaration that the Wagner Act was constitutionally valid. It is not useful here to tease out how this was done. It suffices to note that the Supreme Court finessed the legal issues. It is accepted that what led it to do so was that Roosevelt, angered by the judicial resistance to his New Deal policies, had threatened to pack the Supreme Court of the US with judges who favoured him and his New Deal. The ensuing willingness by the judiciary to sideline supposedly sacred principles in order to fit in with the State’s explicitly stated goals is to be borne in mind when other chapters in this work detail judicial law-making and question its claim to legitimacy based on its political neutrality. Only formalists accept the judicial claim of independence and devotion to political neutrality. This is reflected by the fact that, even after the most senior court in the land had held the Wagner

Act to be constitutionally valid, employers did not acknowledge they now owed the collective bargaining statute respect as a legitimated expression of the people's will. They kept trying to ignore the statute or, whenever it suited them, to wilfully breach its commands and principles.

Brazenly, large employers resorted to the naked use of power to negate the workers' newly granted rights to unionize and bargain. In 1939, a congressional committee, the La Follette Subcommittee, struck to review the problems with the implementation of the *National Labor Relations Act* (Wagner Act), reported that every plant manager in the General Motors corporate firm employed private detectives and, in the aggregate, spent nearly $1 million on spies between 1934 and 1936; Ford Motor Company, for its part, employed thugs to beat up union organizers, and Republican Steel had hired a private police force numbering 370, men equipped with pistols, rifles, shotguns, gas grenades, billy clubs, and more gas weapons and ammunitions than any law enforcement agency in the land possessed. Like the other major corporations, it also had a large spy ring and spent money on anti-union propaganda campaigns. Anti-union propaganda was backed up by systemically engineered union-busting tactics. One of these tactics was to obtain the support of armed local and state police agencies. Indeed, these tactics were well enough established in some locales to have been given their own name, the "Mohawk Valley Formula."

Whatever the expression "class war" means to readers, it is clear that large US employers engaged in it with ferocity as they felt they had lost control over the legislators and the courts. The politicians and judges positioning themselves as acting out of concern for the overall good of the US capitalist system, were giving the working class tools which it had never had. This angered employers. Until the Depression relief laws came into force, the few legal and legitimate victories won by workers had been limited ones and had been easily dealt with by the employing class as it set out to establish and maintain control over its profit-maximization endeavours. The persistence of employer power had been reflected in the still parlous state workers found themselves in before they were confronted by the Great Depression.

As noted in chapter one, the 19th century saw English workers struggle mightily against the harsh discipline imposed on them by the combination of the workhouse, Master and Servants statutes, the repression of trade

unionism, the slow evolution of voting rights, and the increasing economic power of the new industrialists. As the cities swelled with dispossessed workers, desperately looking for employment, they had to live in filthy, degraded, crowded, unsanitary housing, with little access to clean water. When they went to work, men, women, and children as young as six years old were exposed to unsafe conditions and long, long working days which frequently pushed them well beyond their physical limits. Their home and working lives were so debilitating that elites and noblesse oblige thinkers became dubious about the viability and continued acceptability of the newly intensified methods of producing overall welfare.

In this setting, with yet another cholera outbreak raging, Edwin Chadwick, a lawyer who was a follower of the influential liberal Jeremy Bentham, was appointed to head a commission of inquiry. The name of its report which was released in 1842, *Report on the Sanitary Condition of the Labouring Population of Great Britain*, spoke to the anxiety pervading the mindset of the social policy makers of the day. The commission had relied on a compilation of evaluations by observers and on actual interviews with individuals, as well as visitations to houses and workplaces. It offered many accounts of the hardships faced by workers. There were vivid descriptions of the exhaustion of workers, the crammed, dirty spaces in which they worked, the many dangers they confronted every day, the lack of any respite from toil. There were many observers who described the diminished state of the workers as people bereft of vigour or interest in life, more like zombies than sentient human beings. There were heart-wringing accounts of malnourished children doing dangerous work, of their many injuries, many of which would mark and hinder them for life. The progress proffered by a liberal political capitalist economy, with its celebration of freedom of contract, was not being enjoyed by the masses. And they had to fight back.

As already noted, they did so on all possible fronts. They struggled to keep such protective customary and legislative protections that existed in place; they fought for the right to unionize and to vote and, thereby, to curb the power of the owners of the means of protection, whose right to use economic power over workers had been enlarged by the operation of the freedom-of-contract doctrines. Slowly they made inroads as the right, first, to unionize, and then, to bargain, was given some legal leeway, and as, slowly, the punitive and enslaving legislative Master and Servant regime

was blunted and then abolished. Factories Acts were enacted, first to counter the harms done to children and women and to reduce the hours of work. The first of these came in 1802. The details of the reforms these early health and safety statutes proffered speak to the dismal conditions that had to be addressed and why workers were supported by decent, often religious, allies. An early one provided that children below the age of nine should not be allowed to work and that the workday be reduced from 15 to 12 hours. Subsequent statutes improved these reforms. But not to much avail. Even though it was a criminal offence to violate the standards, employers appeared to feel no moral obligation to abide by the reforming legislation. Their truculent, often illegal, resistance had a great deal of success. The authorities were reluctant to treat the employing class as criminals and they were rarely convicted. This is a recurrent theme in the history of capital-labour relations. The earlier discussion of the Master and Servant legislation noted that, while workers' violations were treated as crimes, the masters' breaches were not. This reluctance to call a breach of law a crime had a major impact. By the 1830s, the approach to enforcement of the Factory Acts had changed. The policy-makers of the day did not want to inhibit the factory system unduly and, while it was accepted that the mining and manufacturing industries imposed grievous hardships on workers and that this demanded the setting of some harm-preventive standards, the remedy lay in educating and persuading employers to exercise due diligence to avert violations of these standards, rather than in punishing them. The injuries their profit-seeking activities inflicted should not be seen as crimes but as regrettable outcomes of worthwhile endeavours. Only if employers maliciously ignored identified risks, that is, wilfully breached existing standards, would they be deemed to have acted criminally.

Here I stop to make two points of importance to the theme of this book.

- First, the owners of the means of production never give up on their efforts to force individual workers to compete against each other so as to extract as much value from each of them as they possibly can, even if this comes at horrendous human costs. Given this well-documented history, it would be foolish to think that this impulse no longer infuses employer thinking and acting.
- Second, the success the employing class had in transforming standard-breaching conduct into not-to-be-criminalized conduct, into

> some kind of breach of administrative rules whose violations do not merit stigmatization, plagues contemporary efforts to curb the excesses of profit-chasing capitalists. A regime that is neither purely criminal nor purely civil has evolved. It privileges the owners of the means of production. The price is largely paid by the general public, by the working class.

To return: The results of this gentle approach to enforcement left workers in bad straits, as the Chadwick Report above indicated. Of course, workers understood that their plight and their pitiful advances were attributable to the fact that their numbers did not matter very much in the realm of electoral politics and were difficult to deploy effectively when trying to bargain collectively. They fought on both the organizational and electoral fronts to get a better foothold. Their efforts were perceived as the waging of a war, a real and bloody war. Both the workers and their opponents saw it as such.

As early as 1869, the Knights of Labor was formed in the US. The idea was for workers to transcend the segmentations imposed on them by the logic of the modes of production. The Knights of Labor brought together skilled and unskilled workers under the slogan “an injury to one is the concern of all,” an obvious recognition of the fact that the source of workers’ problems, wherever they found themselves, in whatever industry or occupation they were slotted and howsoever they were harmed, was a common one. The Knights of Labor supported workers to fight their local problems as well as more general causes that affected all workers. One such unifying cause was the length of the workday. Winning limitations on the hours of work demanded of them not only helped make work less arduous and life better, but also put pressure on employers, as they would need more workers, reducing competition among them. Thus it was that the Knights’ support for locked-out workers at Chicago’s McCormick Harvester International got linked to its fight for an 8-hour day, which would have entailed a sharp reduction from the prevailing 60-hour work week. A supporting parade held on May 1, 1886, was met with violence by the police and eleven people were killed. On May 4, another demonstration in Chicago’s Haymarket was confronted by armed police officers. There was a

battle; four police officers and four demonstrators died. War by any other name.

While the Haymarket Riots continue to live in working class history, they also coincided with the beginning of the gradual demise of the Knights of Labor, its membership shrinking, in a relatively short time, from a high of 700,000 to 50,000. But the decline of this organization did not signify that the perceived need to resist had ended. Workers continued to be repressed and harmed; employers, driven by their incessant need to accumulate continued to use legal powers and straightforward physical and violent force. Workers were forced into fighting back, quite literally.

In 1892, Henry Frick, the manager of Andrew Carnegie's Homestead steel plant in Pennsylvania, reduced workers' wages and demanded that employees give up their union memberships. He locked out the workers, and that lockout turned into a strike. Workers picketed the plant to stop it operating. Frick deployed the union-breaking Pinkerton detective agency to push scabs through the picket lines. Armed battles were fought, leaving three Pinkertons and nine workers dead. Many were injured. The workers were victorious and beat up many of the Pinkertons. The state militia was then used to ensure that the scabs got through the picket lines, leading to the workers' defeat. Only a few months later, in 1893, the Pullman Company, which built railroad cars and housed its workers in company premises, got rid of some workers and reduced the wages of others, while leaving the rents to be paid by them intact. The ensuing strike, led by Eugene Debs, spawned a boycott of any train operator who used Pullman cars. No less a person than Grover Cleveland, the president of the US, intervened. He declared a national emergency and sent 12,000 troops to Pullman to break the strike and, not incidentally, the union. Debs was jailed for conspiring to obstruct interstate commerce, a serious crime in a burgeoning capitalist political economy. War by any other name.

Around the same time, the UK was in turmoil. In 1894, coal miners struck to change the insecure payment system, based on the amount of coal dug out by a miner, to one in which a minimum wage was to be guaranteed. They failed after conducting a long, bitter, and often violent strike. It was not until 1912, after a national coal strike which lasted 37 days and involved a million workers, that they won some concessions.

In Canada, too, workers needed to confront intransigent employers aided by anti-union, anti-worker laws. A notable uprising against the length of the working day was launched by the Toronto Printers. They struck as part of the Nine Hours Movement in 1872. The *Globe* newspaper had scabs escorted in to keep its operations going, and its Simon Legree–type owner, George Brown, had criminal conspiracy charges laid against the strike committee leaders. This brought what was, then, a huge crowd of 10,000 protestors to the steps of the legislature, leading to mass arrests. In the end, the political furore forced the government to make considerable concessions. A 54-hour work week was won and a statute enacted that declared that unions would not be treated as illegal organizations.

The latter part of the century brought a wave of strikes across Canada, mainly in the railway, construction, cigar, and mining industries. Notable was a tempestuous three-month-long strike conducted by 5,000 workers against CP Railways. It was the tipping point and, once again, the government had to stabilize the situation by acknowledging that the class warfare fought from above by anarchic capitalists caused capitalism more trouble than it was worth. The *Railways Disputes Act* of 1903 set up a new mechanism of capital/labour adjustment. It accepted a role for unions in the mediation and conciliation of disputes, without legalizing strikes or lockouts. After a vicious and bitter strike in Lethbridge's coal fields, this scheme laid the basis for the passage of the 1907 *Industrial Disputes Investigation Act*. It was to remain the principal federal instrument governing labour relations in Canada until the 1930s. But the need to take illegal strike actions was not stilled. In 1911, 1.8 million workdays were "lost" as workers disregarded strike-inhibiting laws. Continuing frustrations and anger over their terms and conditions of employment came, as we shall see, to a head in 1919.

In Australia, a late-19th-century depression brought on a wave of strikes that lasted from 1890 to 1894. They involved workers in the maritime and agricultural sectors. In Queensland, agricultural workers set up camps at which they conducted military exercises and flew the Eureka flag, a symbol of an earlier uprising on the Victorian goldfields which had famously been put down by the military and that had created a story (that lasts until this day) about the bravery of liberty-seeking workers who stood up against the rich and powerful. The now fearful Queensland government enacted more

vigorous anti-strike laws; the elites and the media alleged that the strikers were bent on staging a coup against the government, and many strikers were convicted of offences such as assault, obstruction, conspiracy, and arson. Sixty farm sheds had been set alight during the confrontations between employers and workers. Everyone understood this to be a class war.

Somewhat later, New Zealand endured the Great Strike of 1913. It arose as militant workers sought to bargain directly with employers, rather than subject themselves to an arbitration system instituted in 1894. These anti-arbitration unionists were known as Red Feds and were opposed by both government and employers. Employers frequently sought to replace them with arbitration unions, or free labourers, as they were called. Eventually this led to strikes in all urban centres. At their zenith, about 15,000 people were on strike, a hefty number given that the population of New Zealand was a mere 1 million. The government, not willing to call directly on the military, established an 800-strong horse-mounted special force. Its attempts to push arbitration union workers through picket lines led to violent clashes. There were sieges of the mounted special forces, soon named Massey's Cossacks (William Massey being the leader of the government) and these confrontations left many injured people and destroyed homes. The episode was a mini-war.

And so it also was, in 1916, in Everton in Washington State. Mill workers on strike in the Pacific Northwest, supported by the Industrial Workers of the World (IWW, or Wobblies, see below), were confronted by strikebreakers hired by their employers. The strikebreakers were assisted by a hostile police force. The Wobblies, in support, gathered on street corners and were arrested for speaking in public, even for reciting the Declaration of Independence. Some were taken to a public park and beaten savagely and evicted from town. It all came to a tragic end when two boats, loaded with Wobblies, sailed up from Seattle to join the fray. Police had gathered at the wharf, shots were exchanged. Two police officers were killed; another 3, perhaps as many as 12, people died and many more were injured. The fight is remembered as the Everton Massacre or Bloody Sunday.

This bloodbath had been preceded by the famed Bread and Roses strike at the Lawrence, Massachusetts, textile mills in 1912. There an employer had arbitrarily cut hours and wages. A strike swiftly spread to a large

number of other firms, bringing workers, mostly women, from 40 different nationalities together. Twenty thousand people in a small town were on strike. The dominant class was appalled. Twelve companies of state militia, the state police, the Lawrence police, and the employers' company guards were marshalled to repress the workers. Two people were killed. The dangerous conditions in town led families to send their children away to safety. Evacuated children were met by 5,000 cheering people in New York. In Lawrence, the response was to send the police to the railway station to stop children from leaving, and they beat mothers and children with billy clubs. As all this came to light, the president of the US, William Howard Taft, set up a commission to inquire into the state of employer-employee relations. That commission made some horrendous findings about living and work conditions. Half of the children died of diseases before the age of 6; the average life expectancy in Lawrence was 25 years; half the working forces in the textile mills were women between the ages of 14 and 18; 36 percent of workers died before they were 25. Calls for reform were inevitable. But, while the workers won great concessions in Lawrence, these, as the militant feminist labour leader Elizabeth Gurley Flynn records, did not survive for very long.

Oppression, repression, insecurity, desperate resistance, violence, hardships, and horrible living conditions prevailed during this period. The tenor of the times was caught brilliantly by social observers and writers such as Upton Sinclair, in his exposé of the conditions of immigrant workers in the meat-packing industry, *The Jungle*, and Robert Tressell's evocative telling of the lives of insecurity, fear, and misery of early-20th-century English workers in his *Ragged Trousered Philanthropists*. These observers had no doubt: workers were engaged in a class war with the employing class, and they were losing.

This had also been clear to the activists who, in 1905, had formed the Industrial Workers of the World, the Wobblies. The organization got a foothold in many jurisdictions. The slogan under which it wanted workers to unite was "an injury to one is an injury to all." It advocated regime change. The preamble to its constitution states:

> The working class and the employing class have nothing in common…. Between these two classes a struggle must go on until the

> workers of the world organize as a class, take possession of the means of production, abolish the wage system, and live in harmony with the Earth…. Instead of the conservative motto, "A fair day's wage for a fair day's work," we must inscribe on our banner the revolutionary watchword, "Abolition of the wage system." It is the historic mission of the working class to do away with capitalism.

The Wobblies saw a world in which, wherever capitalism ruled the roost, workers were to be repressed. It was not a local issue but a system issue. This is why they organized internationally. They also made it plain that capitalism's drive to accumulate presented a threat to the physical environment. Capitalism, therefore, had to be confronted every single moment on every front. The IWW determined that it was foolish to enter into contracts with employers as the laws governing contracts, designed to serve a capitalist system, would enchain workers, would inhibit them from taking necessary collective actions. That is, they were aware of the constraints imposed on working class aspirations by individual property and contract law concepts. All this explains why the IWW took part in many of the bloodiest battles fought during the first decade and a half of the 20th century. This, and their explicitly stated goal to take the means of production away from capitalists, made them a clear and present danger to capitalist relations of production. They were repressed. They were labelled anarchists, agitators, communists; employers tried to set members against each other by pointing to the racial and ethnic differences of the members and enlisted municipal authorities to stop them assembling and speaking in public. The employing classes everywhere got a boost in their anti-Wobblies campaign when the IWW determined that it would not support the governments in their confrontation with Germany during World War I, characterizing it as a war waged on behalf of disputing capitalists and imperialists, that is, a war fought to settle disputes between the class enemies. The US, Canadian, and Australian governments used this as a justification to enact legislation that outlawed or suspended the Wobblies as illegal/subversive organizations.

This sketch of the many bloody battles fought between, on the one hand, employers and the State and, on the other, workers and their unions and organizations, and the barest of outlines of the many oppressions which

made life brutal and short, should suffice to assert that there not only was a class war being waged but that many people and institutions were fully aware of it. So it was that, in April 1919, Article XIII of the Treaty of Versailles established the International Labour Organization (ILO). Its preamble, in a less vociferous but still colourful way, mirrors the IWW's understanding of the world:

> Whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled …

The document then goes on to list a great number of protections that had to be afforded the working class, protections against some of the worst excesses of employer repressions when operating under unfettered capitalist rules. It was no coincidence, of course, that these ideas were persuasive to the capitalist governments of the day, as the 1917 Russian Revolution had made it all too obvious that there now was an immediate and pressing danger to the political economic regime they favoured. But, while thinking elites sensed that they should acknowledge and confront the problems created by employers for the maintenance of capitalism's legitimacy, individual employers showed little inclination to give up their raw power. The class war continued to be fought.

Article XIII of the Treaty was presented on April 19, 1919. On May 1, 1919, a strike of building and metal workers began in Winnipeg. Soon the strikers were joined by other workers in the city and 35,000 people were refusing to work. The impulse for this strike was that conditions for workers were still appalling and they were keenly aware they had made huge sacrifices during the war. To suffer impoverishment while some people had become very rich did, to say the least, not sit well with the workers. The employers saw the strike as a challenge to their dominance. They created a citizens' committee that set out to draw a line in the sand. Submission to this kind of insurgency was unthinkable: "KILL IT NOW" was the employers' actual slogan. To this end, they set up a special police force (many regular police officers had joined the strike) and weaponized it. Strike leaders were arrested; a strikers' parade was met not only by the special force but also by the army and the North-West Mounted Police, the predecessor to the Royal

Canadian Mounted Police (RCMP). Two people died. Once again, the events got a name; once again it was Bloody Sunday. The violent force used against the people defeated the strike.

Such instances of brave (given they had no legal protections or weapons) resistance by workers, and the governments'/employers' willingness to use brute force, peppered the historical records long after the nation-states at Versailles had agreed these kinds of bloodbaths should be prevented. So, in Canada, between 1922 and 1925, there was a wave of strikes against the British Empire Steel Corp (BESCO) in Cape Breton. Twelve hundred militia with machine guns were gathered to offset a strike by 12,000 workers in 1922; in 1923, a worker was killed by a police officer on yet another Bloody Sunday; in 1925, 2,000 soldiers were used to beat back miners striking the same employer. In 1929, two union organizers in Thunder Bay, Ontario, were killed, a drama that reached mythical standing and is captured in the novel *In the Skin of a Lion* by Michael Ondaatje. The Estevan Riot in Saskatchewan in 1931 led to three men being killed by the RCMP, this time on a Bloody Tuesday.

In 1926, in the UK, workers engaged in a general strike in response to a continuous attack on wages. Initially a strike led by transport unionists, it got more and more support. The strike badly shook the government, which declared the strike to be a national emergency and called on volunteers to maintain needed services. The strike lasted nine days and was eventually settled by negotiations. While today historians doubt that the strikers had revolutionary aims, the politician and diarist Duff Cooper's much-cited account tells us that, at the time, it was seen as the greatest strike that Europe had ever seen and that it was perceived as threatening the survival of parliamentary government. The seeds of revolution seemed to have been sown. And after it was all over, the government felt forced to enact legislation that prohibited sympathetic strikes, that is, strikes where workers supported members of their class even if they were not directly affected by the employer conduct that had led their comrades to take action.

In Australia, at Cessnock in New South Wales, mining and agricultural employers had cut wages. When workers reacted angrily, they were locked out. The lockout/strike lasted eight months. The employers brought in large numbers of scabs. Workers tried to stop them and 10,000 people, a large

number in that setting, came to protest. The police were deployed on behalf of the employers. One person was killed, 45 were injured.

These stories are not isolated examples of things going awry. They reflect *the* story, the story of bloodily fought class wars. Many other examples might have been given.

## SUMMATION

1. The drive to maximize profits by employers never ceased. The protections offered workers remained minimal, and the law-and-order approach that safeguarded private property and individual contract doctrines put the police and other coercive institutions of the State at the disposal of the employing class.
2. Ideological, legal, and physical repressions inhered in capital-labour relations. No one doubted there was an ongoing class war. The employers' desire to wage and win it persisted.
3. As we have seen, even after the Great Depression had forced governments to devise policies that would give workers and their unions more countervailing powers, employers used the judiciary *and* violence to turn back the clock. Governments saw the need for change but employers were not persuaded.
4. It was the end of World War II that brought a change in approach, behaviours, and discourse.

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PART II

# *The Right to Strike*

Wherein it is shown that the conditions during and immediately after World War II put workers in a good position to make gains. The right to membership in trade unions was bestowed more legitimacy, the social wage was enriched, and civil rights were enlarged. Legal instruments designed to implement these reforms were crafted. As working class gains were made, capitalists sought to limit their losses. The story told in this Part is that this counteroffensive was aided greatly by the fact that the legal implementation of the reforms did not, in principle, negate the capitalism-favouring legal structural and ideological starting points, specifically (a) the rights that inhere in the protection of private property, and (b) the privileging of individualism over collectivism. The judiciary has been a valued ally of the employing class.

CHAPTER 3

# *World War II: Promises made, fulfilled, and then diluted*

When World War II commenced, the economies which are the focus of this work were still rocking from the aftershocks of the long Depression. Workers were enlisted to fight against the fascist forces, and those staying at home were asked to make sacrifices on the domestic front. Pressures were exerted to inhibit workers so that they would not take undue advantage of the opportunity provided by the intensified need for their services. To be sure, it was a softer reaction than that spawned by the Black Plague when the then employing class was also troubled by the scarcity of labour. Sweetening the demands for sacrifice, governments promised workers that, after a successful completion of the war, their lot would be improved. One of the better-known versions of these inducements (which came somewhat late in the piece) was President Roosevelt's 1944 declaration of his intent to introduce a new Bill of Rights. His rationale was that the political rights embedded in the existing Bill of Rights had "proved inadequate to assure us equality in the pursuit of happiness … true individual freedom cannot exist without economic security and independence." He proposed a guarantee of jobs that would pay enough to provide for adequate food, clothing, and recreation; access to affordable housing, good education, and adequate medical care; and protection against the fear of economic destitution because of old age, sickness, accident, and unemployment. "Necessitous men are not free men," he solemnly declared. It was an earnest acknowledgement, no doubt informed by the knowledge of the open class wars of the pre-war period, that change was necessary if the system was to survive. And, while the promise of a fulsome new Bill of Rights was never realized, some of its aspirations were given life.

In the immediate post-war period, economic circumstances greatly aided workers as they insisted that their governments and would-be employers should meet some of their political promises. The need to rebuild shattered economies, especially in Europe, and the opportunity to satisfy pent-up demand everywhere put capitalists in the nations least damaged by the war in a position to profit handsomely. The Marshall Plan enabled the needy nation-states to pay for the goods and services supplied by intensified production in countries like the US, Canada, Australia, and New Zealand. In the latter three countries, waves of immigrants added to productive capacities as, for once, there were not enough employees to go around. Capitalists could thrive and afford to honour some of the promised concessions made to the working class. Workers agitated and activated to ensure that this would happen. And, as had been the case in 1919, thinking capitalists were also motivated by an existential fear. The Soviet Union, although severely damaged during the war, had emerged as a powerful, self-proclaimed non-capitalist force, one whose political and economic sphere of influence was spreading fast. It appeared able to provide for its citizens better than Russia had during the non-socialist days. The Soviet Union created considerable material welfare while advocating a different method of wealth generation and distribution than that which prevailed in capitalist countries. And, to heighten the capitalist nations' anxiety, there were signs that, in the aftermath of the war, Communist parties in Italy and France—and to a lesser extent in Spain—were enjoying eye-catching popular support. This pushed governments in the "West" to create policies that demonstrated that liberal market capitalism could outdo socialist planning.

In the US and in Canada (which had adopted its version of the Wagner Act in 1944), the union promotion and collective bargaining elements of the Wagner Act regime were perfected. Unionization was given a boost at the same time as unions were being taught that they could not follow the socialist path. Communists were driven out ere unions were deemed entitled to participate in the newly legitimated regime that allowed unions to fight for terms and conditions for their members. But, once this was done, unions were to be welcomed into the scheme designed to stabilize capital-labour relations. Policy-makers understood this to be necessary to restore an acceptable balance of power in a society where wealth was unequally distributed. Roosevelt's message, "necessitous men are not free men," was

still resonating and reminding policy-makers that, to maintain and perpetuate capitalism, naturally anarchic capitalists had to be curbed to some extent. If the power of the wealth gathered inside corporate envelopes could be offset by other groups, then the capitalist system could, and possibly would be seen to, work fairly.

Unions, entitled to exist and to enter into negotiations that allowed them to use a (carefully limited) measure of economic power to reach enforceable collective agreements, constituted a major building block in this reshaped capitalism. In addition to giving unions this role, the fostering and spread of consumer associations and political lobbies, and the growth of pension funds which, notionally, could exercise their shareholder powers on behalf of their beneficiaries were to help construct, as the famed liberal US economist John Kenneth Galbraith labelled it, significant countervailing power. There was an optimism abroad that such countervailing power would reduce the otherwise unchallengeable economic and political might of the wealthy. Governments felt confident that it made sense to support policies that demonstrated to the working class that it need not wage war against the employing class to live well. From the 1960s onwards, the growth in scope and nature of protections and safeguards afforded the wealthless was impressive.

For example, in Canada, the Canada and Quebec Pension Plans were put in place; by 1970, the Canada Assistance Plan, a universal social assistance regime covering the old and the disabled, had been established. Older schemes, such as unemployment insurance, workers' compensation, and, of course, enforceable statutory collective bargaining, were improved. Floors guaranteeing minimum standards for employed people, increases in minimum wages, a limit on the number of hours of day per hour and week that could be demanded, and rights to notice before being dismissed became legal entitlements; provisions for paid vacation time were introduced (as was paid sick leave in some jurisdictions). In these ways, even workers not protected by collective bargaining were relieved from some of the hardships that unfettered contract-making would have imposed on them. In addition to all these safeguards, governments, taking advantage of a fast-growing economy and eager to demonstrate that liberal capitalist regimes could deliver welfare, increased their spending to move ever more closely to

universal access to quality education and health care. The social wage was enriched.

### THE MESSAGE SENT TO WORKERS

Everything was saying: there is no longer any need to look to other political systems when pursuing well-being and happiness. There is no longer any need to engage in class war. Books were written to propagandize this idea. Daniel Bell penned *The End of Ideology* in 1965. A business organization guru, Peter Drucker, wrote that, if socialism was the other system to which workers might look, they could stop looking: maturing capitalism had brought them the very things socialism offered and had done so while providing more political freedoms. He argued that, as workers owned shares in many corporations through their pension funds, there was no longer anything like a division between the classes. Workers and employers had a mutual interest in maximizing profits; workers could exercise some control over how profits should be chased. Who needed to replace this kind of benign capitalism?

The better material conditions were not obtained in isolation from other political and social struggles. In many countries there was a vigorous movement to shed their status as colonies. The so-called Bandung project, or development theory movement, which emerged out of these decolonization struggles spawned strong arguments about the nature of what a modern nation-state ought to look like. Choices between a bourgeois or a socialist democracy or democratic socialism were to be made; the meanings of liberty and autonomy were up for grabs, and the issue of whether individualism or collectivism ought to have pride of place was not seen as a decided question.

All of this could not help but have a marked effect on the way in which people everywhere engaged in their domestic agitations. There was rebellion against all authority. The Soviets had to deal with the Hungarian and Czechoslovakian uprisings; guerrilla, nationalist, and class-based insurgencies arose in capitalist polities such Italy, France, and in Quebec. Mexico confronted student uprisings as the 1968 Olympics neared; the 1968 Tet offensive in Vietnam brought people out into the streets in the US. Mostly these localized uprisings were successfully repressed by the use of naked State power. But these struggles brought out, and raised

consciousness about, many facets of illiberal repressions. Simultaneously, issues of race and women's claims to equality, often impelled and then infused with class-conflict arguments, had to be confronted. And soon renewed questions about the waging of wars and, more pointedly, in whose interest they were fought (as evidenced by the fact that the Korean and Vietnam wars led to mass anti-war movements) led to anti-status-quo agitations.

In sum, it was a long period of political turbulence, one in which questions were being raised about the material outcomes of capitalism, about capitalism's political impacts, and about its relationship to electoral democracy. As well as trade unions seeing their legal and economic powers improved and the social wage being greatly enriched, a massively different approach to race and gender relations emerged. New anti-discrimination laws were written. Racial integration and equal opportunity were materially fortified. The changes in the post-war period were so dramatic that conceptualists such as T.H. Marshall contended that it now could be said that society had evolved to create inclusive citizenship for its members. He saw citizenship as a complex of civil, economic, political, and social rights. To Marshall and his followers, the gains made by workers and previously marginalized sectors of the polity marked a new status for individuals. Huge progressive strides on the road to freedom had been made, and it could be expected that further steps would follow.

This optimism, this belief that social relations were no longer to be seen as reflecting a class-divided political economy, was shared by opinion leaders in capital-labour scholarship and policy-making. H.W. Arthurs coined the phrase "industrial citizenship" to describe the status of Canadian workers in 1967. It was a way of saying that, when added to the growing civil protections available to one and all, the process and material improvements for workers meant that they were now included as full participants in the polity. This was a popular view. Its proponents made much of the advances proffered by the collective bargaining regime of the now firmly embedded Wagner Act schemes. Workers covered by such a system had not only had their negotiating clout increased, but had also had their right to participate in rule-making and in decision-making in the workplace enhanced enormously. Emphasis was laid on the fact that, under the sophisticated grievance arbitration system that went along with the

interest dispute settling mechanisms of these schemes, workers could pursue their rights and entitlements by having the rule of law, rather than the rule of economic power, govern the issues. This was a clear signal that workers' rights and privileges in the workplace were more akin to those of citizens in civil society than they had ever been. Workers had a status; they were not defined as belonging to a class.

## THE EMPLOYERS' FIGHT-BACK

This confidence that not just a page had been turned but a new book had been opened came, as noted above, after some of the troublesome radical actors and aspects of anti-capitalism had been marginalized. Leftism had been rooted out of unions. And, more stealthily, the scope of workers' collective powers was reduced bit by bit. This had been a reaction to some substantial workers' gains. During the war, some workers were well placed to use increased bargaining leverage to make successful demands. And, in the aftermath of the war, workers had truly bared their teeth.

In the US, more strikes were called in 1946 than ever before. Automobile, steel, rubber, meat-packing, oil refinery, and electrical appliance workers all withdrew their labour. Some cities—Pittsburgh, Oakland, and Rochester—had to confront quasi-general strikes. The dangers presented by energized unions resulted in an employer-led response. The initial reaction was to repress. Despite the Roosevelt promises, the federal government sprang to the employing class's aid. The Taft-Hartley Act was enacted. Unions were required to provide very lengthy (sixty days) notice before they could legally use the strike. That notice could be lengthened by a government that felt it necessary to do so. All sorts of solidarity collective actions, such as secondary boycotting and mass picketing, were prohibited; the collective use of power to influence the political sphere was not to be allowed; public employees were denied the right to strike. As if to emphasize the purpose of the legislation, the Taft-Hartley Act also made it possible for employers to go to their old friend, the judiciary, to bring tort actions (civil suits) against unions that interfered with their individual property and contract rights, overturning the decade-and-a-half-old New Deal Norris–La Guardia Act, which had tried to foreclose anti-collectivist, judicially based, assaults on workers' rights.

These details of the instant reaction to manifestations of workers' collective power have been set out because the attitude and approach that inheres in it are still reflected in the modern collective bargaining laws in the economies covered in this book. Details will be fleshed out in later chapters. The dominant class's purpose has been, and remains, to make certain that, if legitimacy is to be accorded to unions and to the right to withhold labour, it must be limited to narrow economic purposes and restricted to some spheres of the economy, and must never be allowed to have sufficient clout to affect the intrinsic nature of a political economy based on the maintenance and perpetuation of the private ownership of the means of production. Essential to capitalist success, then, is the imposition of workable limitations on strikers' disruptive capacities. In North America —and subsequently in Australia and New Zealand, as will be seen— confining permitted bargaining and striking to one workplace at a time and prohibiting the use of the strike as a political weapon became crucial to the attainment of this employer goal.

In the UK, where, as noted in chapter one, unions gradually won some legislative immunities that protected their collective actions from judicially based attacks, their right to bargain collectively was not given the imprimatur of legislation. Rather, the deal was that they could bargain collectively as long as they stayed within such protected legal zones as they had carved out over time. Their agreements were not enforceable at law, but, in practice, they were honoured. In the relatively good economic times of the late 1950s and early 1960s, there were many strikes. While employers made quite successful use of the courts' inherent willingness to restrain unions on the basis that they unduly interfered with private property rights, individualism, and free contracting, and despite the fact that judges were inventive as they crafted new inhibitions on collectivism, union militance persisted. Unions were able to forge industry-wide settlements and there were many localized outbreaks of militance, apparently uncontrolled by the union leaderships. From the employers' and governments' perspective, unionized workers were increasingly perceived as a destabilizing force. Brakes had to be put on, a delicate political problem given the post-war entente. Resort was had to the establishment of a public inquiry. The Royal Commission on Trade Unions and Employers'

Associations (the Donovan Commission) was set up and, in 1965, delivered what employers and the government wanted.

Its recommendations honoured Britain's adherence to voluntarism, that is, to the promotion of getting to terms and conditions of employment by private voluntary arrangements that allowed for collective action by both employers and workers. It was way too late to go back on those pivotal ideas. But the Donovan Commission also recommended that there be greater supervision of unions to ensure that the bolstered union legitimacy was not abused. In return for accepting external monitoring of their internal affairs and for their acceptance of their role as monitors of their memberships, unions' legitimacy as partners in the facilitation of a for-profit private economic regime was cemented. As well, individual workers were to be given better employment protection by allowing them to go to easily accessible adjudicating tribunals if they felt that they had been treated unfairly as individuals. "Tame and co-opt" was the push of the Donovan scheme. It became the basis of the UK's capital-labour mechanism of adjustment over the next few decades.

As seen, the US had come roughly to the same point when the union-favouring Wagner Act model was stripped of some of the menace it presented to the employer class by the enactment of the Taft-Hartley Act and by the social and political impacts of the Red Scare and anti-corruption campaigns. To bolster the latter, the federal government enacted the Landrum-Griffin Act in 1959. It provided for administrative control over unions' internal affairs, the right to monitor relations between union officials and union members, requiring secret elections when a strike was to be called, and regulating how dues might be raised and the processes whereby officials were to be re-elected. All these provisions were designed to put fetters on union militance and to advance the cause of individualism. The quid pro quo for union acceptance of these constraints was that employers would not object to steady wage increases and the granting of fringe benefits, and would not use their economic power to block the passage of some social welfare legislation.

In Canada, too, the post-war period was one of worker militance. This pushed governments to retool the already adopted Wagner Act model. As in the US, the aim was to ensure that the newly legitimated power of the working class not get out of hand. The first salvo was fired as a result of a

99-day-long strike at the Ford Motors plant in Windsor in 1945. The larger context was that Ford had laid off 50,000 employees in the US, leading to massive strikes which Henry Ford II blamed on communist agitators. Canadian governments were deeply concerned about the strike in Windsor and, to settle it in a way that would please them, appointed a prestigious judge, Ivan Rand, as arbitrator. His decision framed the way in which the Wagner Act model was to be moulded in Canada. Unions were to be respected as exclusive bargaining agents for workers provided they accepted responsibility for exercising discipline over the workers, in particular, for ensuring that they would not engage in non-sanctioned collective work stoppages. In return, trade unions would get the boon of having employers take the dues owed for union membership straight out of the workers' pay packets, a huge benefit for unions. It is now known as the Rand Formula.

As part and parcel of the struggles about the scope of the Wagner Act model, there were legal battles about the extent of legitimate collective bargaining under that model. Workers, needing to take competition among themselves out of the picture as much as possible, pressed for industry- or region-wide bargaining units. Employers wanted to restrict the scope of the newly legalized bargaining and strikes to single, discrete employment settings, although it was also the case that, in both the US and Canada, there were some situations where it suited employers to have industry-wide or national bargaining operate. The oligopolistic car industry was a prime example. But the logic of staying as close to individual contracting as possible was strongly favoured by labour relations boards and employers. They were intent on restricting the potential power of collectivizing workers. This logic won out. Industry-wide bargaining became the exception (albeit a very important one when it did occur). Plant-by-plant bargaining became the norm and remains so. This signifies that, while collective bargaining has, after much opposition, been legitimated, its scope is much more limited than militant unionists might have hoped for when the Wagner Act model was born.

Thus, quite early in the history of the Wagner Act model in both the US and Canada, clear messages were being sent by the elites, governments, administrative boards, and heavyweights like Rand (and Bora Laskin, who was to become the doyen of Canadian labour lawyers), that the Wagner Act

model was to be a tightly controlled mechanism of adjustment of capital-labour relations disputations. But these messages were being sent during a period when favourable conditions militated workers to confront their employers regardless of the law. In the 1960s, Canada, like England, was experiencing an explosion of what came to be called wildcat strikes. More often than not, they were walkouts by workers which the letter of collective bargaining law forbade. Under those laws, strikes were only permissible when a collective agreement was to be negotiated for the first time or to be renewed. And even then such strikes had to be sanctioned by a certified bargaining agent, that is, a union. Many of the "wildcat" strikes satisfied none of these conditions. Even more troubling to the status quo was the fact that the times were such that progressive workers might engage in strikes to promote social issues rather than just improvements of their own terms and conditions of employment. This, too, was not a permissible use of the strike weapon under the Wagner Act model.

These "unauthorized" bursts of militance not only lacked the protection of Canada's newfangled labour relations legislation, but they were also likely to be breaches of the common law, which supposedly had been relegated to the rubbish pile. It had been widely believed that legislatures had renounced the old class-based approaches of the judiciary and that these approaches were no longer relevant. It turned out that the principles on which the common law's anti-worker doctrines had been based had merely been sleeping.

The English tort law precedents which protected property and individual contract-making were still part and parcel of Canada's common law. And, as noted in chapter one, newfangled tort actions were being manufactured by anti-union English courts in the 1950s and 1960s. These innovations, as a matter of legal methodology, had authoritative force in Canada, and the motives which drove the English courts, namely their desire to uphold private property and contract rights, resonated strongly with Canadian judges. Indeed, some were so eager to endorse the sanctity of private property and contract that, in one decision in 1963, *Hersees of Woodstock Ltd. v. Goldstein*, the Ontario Court of Appeal set out to make it clear to one and all that collective action to promote workers' interests was always to be considered less publicly important than the interests of private property owners in chasing profits. To make its point in the awkward case before it,

it actually twisted the common law developed by the English courts into a pretzel. To this panel of judges, the existing legal criteria of liability were not as important as the teaching of a lesson to stroppy workers. As will be seen below, elites are always keen on teaching workers that they are to understand that there are limitations on their citizenship rights.

All this made it easy for Canadian employers, faced with wildcat actions, to go to the courts to get instant relief. They merely had to say that they were about to suffer irreparable harm as a result of an unlawful collective withdrawal of labour, and they would get an enforceable cease and desist order against the workers. Breach of such an order, a labour injunction, could lead to severe penalties: it was treated as a contempt of court. The anti-worker bias was reflected in the fact that these assaults by employers were made very easy for them. They could get an *ex parte* order, that is, an order without the defendants being present at the hearing where they claimed to be irreparably harmed by the missing defendants. Papered-over class conflict was being uncovered.

It quickly led to a major legitimacy crisis for the Wagner Act model, a scheme which was meant to bring stability, to bring the parties closer, to bring them to the awareness that they were not class enemies. Workers were not accepting its limitations, and supposedly forgotten old class war legal tools were being applied to curb their militance. As they do so often, governments responded by establishing a series of public hearings to take the heat out of the controversies. There were two such public commissions at the provincial level, both in Ontario. It was the industrial heartland and, therefore, had more of these unsanctioned strikes than other provinces did. The resulting reports lamented the headstrong nature of some of the strikers, chronicled the number of incidents and how they were handled, and made recommendations that would make it a little more difficult for employers to get injunctions. Federally, a much wider inquiry was launched in 1968, the Woods Task Force. It provided a well-researched assessment of the values of Wagner Act–style collective bargaining. It was firm about the need to support responsible trade unionism and about the importance of giving workers access to a dispute settlement scheme, grievance arbitration, during the life of a collective agreement. With the appropriate protections for unions and individual workers in place, it argued, it would be fair to leave employers with the power to run their business as they chose and to

be able to rely on industrial peace during the life of a collective agreement. Once again “tame and co-opt” was the policy favoured.

Old employer powers were being curbed and union leverage was to be more tightly boundarized than it initially had been. This was the taming. Both employers and unions were to internalize and accept the continuation of the underlying structure of capitalist relations of production. It was explicitly declared that the right to own and do with private property as the title-holder decreed, and the associated privileging of voluntarily reached contracts over government-mandated terms and conditions, remained essential pivots of the modernized entente of capital-labour relations. This was the co-optation. In the words of the Woods Task Force, when it stated why it approved of the Wagner Act model, to which it wanted to make some improvements, it declared that the system preserved everything that was good and sacrosanct: “The underlying concept of the free individual, private property and freedom of contract have produced an essentially capitalistic, although mixed enterprise economy” (para. 30). The goal was to maintain and perpetuate capitalist relations of production by making them institutionally less brutal.

In New Zealand and Australia, the immediate post-war period did not require policy-makers to build a scheme that legitimated unionism. Their very early adoption of a compulsory arbitration regime which settled terms and conditions in a quasi-legislative manner needed, for its effective operation, unions to initiate claims on behalf of the covered workers. Unions were, in fact, the linchpin of their systems. So, when the growth in population and worldwide pent-up demand for staples generated more affluent economic and political circumstances, workers could make their demands through the schemes’ mechanisms. They could play a role without having to overhaul a system, as had been necessary in North America. The antipodean unions were better placed. But a spectre of danger remained. The dominance of the compulsory arbitral regime did not mean that New Zealand and Australia had abandoned the legal foundations and ideology that had evolved over the previous 150 years, even though they were hidden from view.

These nation-states had been English colonies and shared the Empire’s legal institutions and thinking. Cases decided in English courts continued to have great sway in all spheres. Indeed, New Zealand and Australia insisted

on preserving the continued links of the legal system with the old colonial judicial system. When they got an opportunity to do so, they showed themselves eager to apply both the old and emerging England-based capital-labour common law doctrines. Thus, with the compulsory arbitration scheme still riding high, the High Court of Australia, in a case called *Williams v. Hursey*, categorically declared ineffective the governing arbitration statute's explicit provision that no one participating in the scheme could sue in a common law court for alleged violations of the governing statute. Courts could not be excluded from exercising their well-established powers to deal with property and contractual disputes. This approach came to play a central role in the developments that led to the smashing of unions in both New Zealand and Australia.

Shots began to be fired by individual employers as they chafed under an arbitral system that, they believed, favoured unions too much and eroded the "natural" labour markets. By the late 1960s and early 1970s, that is, 20 to 25 years or so into Les Trente Glorieuses, employers were reaching back to mechanisms found in the box of tools first fashioned in the 18th and 19th centuries and now updated by English courts.

In Australia, Clarrie O'Shea, a union leader, was sent to jail for refusing to pay outstanding monies for penalties incurred by his union for breaches of an arbitration award. Within two hours, 150,000 workers massed outside the courthouse where he had been sentenced. The next day he was released, the court saying that an anonymous donor had paid the fines. It was seen as a triumph by the union movement. The employers saw it as a massive defeat. In 1977, a conservative party won a federal election in Australia. Citing the Clarrie O'Shea affair, the conservative party said that it was plain that unions could no longer be controlled by the governing rules. The entente was under threat because unions had too much power. It promulgated a new set of provisions, Part IV of the *Trades Practices Act 1974* (Cth.). These practices made it an offence for two or more parties to engage in actions which, by influencing a third party, interfered with commercial undertakings and contracts. In short, it proscribed a major union weapon: secondary boycotts. As a union and its members were separate persons under the law, it was easy to characterize much collective action by unionized workers as potential infringements because it always involved more than one person. This characterization was welcomed by

traditionally anti-working-class judges. The *Trade Practices Act* provisions would encourage Australian judges to return to their old anti-union tendencies. These laws undergirded their belief that there was an historic task to defend private property and individual contract rights from assaults by worker collectivism.

This fitted right in with the message the old colonies' judges were receiving from UK courts during the 1950s and 1960s. The British judges twisted and turned to derail legislative protections unions had won in the past. These judicial remedies and the purpose for providing them in the UK undoubtedly encouraged the Australian government to endorse the employers' agenda with its new legislation. All this awakened Australian employers' awareness of the utility of dormant legal rules and ideas, and they turned to the courts. In *Woolley* v. *Dunford*, at the behest of an employer, a South Australian court reached out and embraced the newest anti-union decisions delivered in England. The employers' fight-back was in full swing.

Of course, in large part, this invigorated employer aggression everywhere was attributable to a radically changing economic and political context. By 1971, the war in Vietnam had become a drain on the US finances. The Nixon White House abandoned the gold standard to free up the flow of financial capital. Prices went up, wages could not keep pace. It was, however, also easier for the working class to borrow money. Personal debt increased and house prices climbed ever higher. Inherently, this was a fragile situation. It was aggravated by the 1973 OPEC crisis, which caused the price of oil, and everything that depended on it, to soar.

Circumstances had changed dramatically since the end of World War II. It was easy to argue that it made little sense to let mechanisms of adjustment of capital-labour disputes fashioned for a different time and for different circumstances operate as they were designed to do. The argument being available, it was put to use.

Some of the governments reacted by trying to switch off the existing engines. Bargaining and compulsory arbitration were downgraded by governments everywhere. The Nixon administration imposed a temporary 90-day freeze on prices and wages. In Canada, a re-elected Trudeau government (contrary to its election promises) enacted an anti-inflation statute which made changes in prices and wages subject to an

administrative tribunal's approval. It was to last for three years, marginalizing Canadian unions and collective bargaining for this lengthy period. In New Zealand, additionally affected by the UK's entry into the European Union, which robbed New Zealand of its favoured nation trading position, income policies which set the main terms and conditions for workers were put in place for all but eight months of the period 1971 through 1984. By 1973, the New Zealand compulsory arbitration system had been remodelled to reflect these changed mechanisms of adjustment. The most significant change was to establish some strike action as permissible and legitimate, but all other as proscribed. It was a declaration of a public turnaround: union militance was no longer as tolerable, was no longer as unproblematic, as it had been during the compulsory arbitration days. That this was understood to be a profound change is reflected by the fact that a quid pro quo was proffered to the unions. Their diminished collective clout might leave individuals less protected than they had been. New provisions for the settlement of individual grievances by an external and neutral body was intended to show that the government was not being anti-worker, merely being economically sensible by curtailing union power.

In Australia, ruled by non-Labor governments for most of this period, it was apparently harder to attack the dominant compulsory arbitral system directly. This had to wait until Labor governments came into power. They, it turned out, were in a better position to cajole and push their union supporters into accepting what had become the conventional view: there should be more emphasis on competitiveness, on voluntarism, less on collectivism, on compulsion and social engineering, which had been thought to be the norm for decades. The changes the Labor Party were to forge in the 1980s were stunning.

While all these disruptions and reactions to them were coming to the fore, the writings, teachings, and ideas of right-wing intellectual radicals gained prominence. Chief among them was F.A. Hayek, who, as early as 1936, had proclaimed the futility of trying to direct an economy. He had argued that governments could not make sensible decisions about what people wanted or could do, and were thus incapable of efficiently allocating talents and resources. This should be left to markets, which should remain as unfettered as possible. More, governments should not be encouraged to redistribute the existing distribution of wealth and assets, as they would get

it wrong at the expense of efficiency and the liberty of individuals. When Hayek first formulated these ideas in 1936, they had little impact. The world was preoccupied with the Great Depression and turned to the work and ideas of John Maynard Keynes, ideas which contrasted sharply with those of Hayek. But, in the post-war period, libertarians, anxious about governments' promises to redistribute and to enhance workers' powers, formed the Mont Pelerin Society to help propagate Hayek's insights. By the mid to late 1960s, the employing class started to build instrumentally on this intellectual movement, which was fortified by the emergence of the so-called Chicago School led by Milton Friedman and George Stigler. In the US the Chamber of Commerce asked a well-regarded lawyer to provide it with a blueprint as to how capital might fight off the assaults on its dominance. The ensuing Powell Memorandum became a launching pad for the "re-education" of bureaucrats, politicians, and university teachers. In 1975, the Trilateral Commission engaged prominent professors to pen a book, *The Crisis of Democracy*, denouncing the dangers presented to the political economy by the enhanced capacity of the State to guide the economy and to redistribute property. Major think tanks and lobby groups mushroomed. In New Zealand, the Business Roundtable was a prominent force; in Australia, the H.R. Nicholls Society played a major role; in Canada, the Business Council on National Issues was very influential; in the US the Business Roundtable and a veritable army of think tanks worked very hard at changing the mindset of politicians, bureaucrats, and the public in general. Just as the workers during the late 17th and early 18th centuries had sought to return to a better time, capitalists were pushing hard to revive the good old times which had privileged private property, individualism, and a less-than-generous social wage. They met with considerable success.

The argument here is not that these ideas, in and of themselves, led to the demise of Les Trente Glorieuses. The changes in material condition were crucial, but old beliefs and ideas that had been festering and were now being newly fostered helped the process along. There was a newly fertile soil in which to cultivate fields in which legal actions and policies that endorsed the pre-eminence of market over statutory regulation could grow.

In New Zealand, in 1984, a Labor government implemented Rogernomics. Roger Douglas, the minister of finance, had designed an economic policy that devalued the New Zealand dollar, cut subsidies for

previously protected manufacturing industries, and provided incentives for exporting industries. In that context, rights of unions, already enfeebled by changes to the compulsory arbitral system, were further enfeebled. And, firing a warning shot, the existing Labour Court's jurisdiction was extended. Ominously, it could now entertain tort actions, that is, those civil actions developed to protect individual property and contract rights threatened when there was a strike or lockout. These actions, so consciously developed during the 18th and 19th centuries, had been sidelined for much of the period during which arbitration governed capital-labour relations. A new scenario, a revival of old ideas and laws, was being foreshadowed. The next nail in the coffin came shortly afterwards. By 1991, an anti-union government, under pressure from fierce employer lobbyists, made individual bargaining the default mechanism of adjustment in the non-state sphere. While it is to be noted that, from about 2000 onwards, there was some effort made to promote good faith collective bargaining, it remained an aspiration rather than a reality until 2022, when some more helpful industry-wide bargaining provisions were enacted. It is too early to say how this will work out, but the prospects are not all that bright. Rugged individualism has been given pride of place. It is likely to influence the impact of the new legislation. A leading New Zealand labour lawyer, Gordon Anderson, has observed that, despite the nod toward the continued legitimacy of some collective bargaining, the spirit of the old Master and Servant laws has been revived and is thriving.

At about the time that New Zealand engineered the sea change that came to be known as Rogernomics, a newly elected Australian Labor Party government, influenced by New Zealand and by briefs coming out of the Organization for Economic Cooperation and Development (OECD), decided to combat high inflation and growing unemployment by deregulating the economy, a movement that, rather oddly, came to be known as economic reform. Australia floated its dollar, invited international banks to set up business, and tore away tariff walls behind which Australian industry had hidden up to then. In 1983, it fashioned the first of seven Prices and Incomes Accords. These were deals between the government and umbrella union associations. Unions agreed to temper their demands, in return for which the government undertook to enhance the social wage. Increased spending on education, a more universal health care protection

scheme, called Medicare, family benefits, and other welfare benefits were to be crafted and improved. Later a major pension regime, superannuation, was instituted. One of the chief remaining functions of the arbitral tribunal was to set an adequate basic wage for those most vulnerable in the workforce. It is difficult to say whether, overall, workers became better off as a result of these accords: wage increases dropped precipitously but the social wage was materially enriched. But one thing was certain. The reforms changed the basic capital-labour dispute settling mechanisms of this polity.

The emphasis of the Prices and Incomes Accords was to sideline compulsory arbitration and to promote private agreement-making. The focus of this entente was that terms and conditions should be set by reaching Enterprise Bargaining Agreements. The name says it all: voluntarism of a contractual type was favoured over the imposition of terms and conditions by a third party. More: such agreements should be made on an enterprise-by-enterprise basis. This was a long way removed from the industry-wide, region-wide awards favoured by compulsory arbitration. In addition, the unions' promise to temper their demands meant that they were expected to demonstrate that they had made a contribution to an enterprise's productivity to justify their demands of an improved employment package. They were asked to be junior partners, rather than sovereign antagonists.

By the early 1990s, the old Australian compulsory regime had become a backstop, rather than the central wage and economic policy-making institution it had been. Almost inevitably, when a very conservative government came to power in 1996, it took the now-endorsed logic of private and voluntary contract-making to the next level. In its legislation, tellingly entitled *Work Choices*, it proclaimed that contract-making between individual employers and individual employees should be the primary way to set terms and conditions of employment. It was the optimal way of guaranteeing freedom for all concerned. The name given to these individual contracts was Australian Workplace Agreements (AWAs). The government was given moral support by aggressive employers who, relying on the English courts' expanded tort rubrics, had launched successful judicial attacks on unions who sought to exercise the collective powers they had enjoyed for most of the 20th century. This was, rightly, seen as a radical reversal of past gains and led to a major, and successful, political campaign

by unions and the (now in opposition) Labor Party. The return of a Labor government did lead to the abolition of AWAs as the default position, but did not strengthen unions' or workers' rights very much at all. The Labor Party was wedded to voluntarism and, at best, blunted, but did not abrogate, the serious assaults on collectivism established by *Work Choices*.

What Australia did do, as New Zealand had done when it fettered unions, was to provide better protections against the oppression of individual employees, as they now were much more likely to stand naked before employers. Under the compulsory arbitration system, no such safeguards had been necessary. Well-placed workers in benchmarked industries got a decent deal from the arbitral system supplemented by collective action. These terms were then treated as a community standard by the arbitral tribunals, and adapted by them to apply to the weaker sectors of the economy. One of the results had been that, until well into the 1970s, income inequality in Australia was much less than that in other OECD nations. Today, Australia's income equality rating place it as the second to third most unequal in this comparator group. Unions had been powerful agents on behalf of the whole of the working class. This is no longer true.

This downgrading of union standing is reflected in the fact that the latest versions of Australia's federal legislation require that it is only the employer which has the power to initiate bargaining. It does not have to do so. More (partly for constitutional reasons which should not detain us here), the employer has to be a corporation. It does not have to bargain with a union. The union, which once was *the* linchpin to capital-labour dispute settlement mechanisms, now has no special standing at all. Unions have no automatic right to represent workers in any enterprise. They must win that right, and, if they do, they will not be a party to any ensuing enterprise bargaining agreement; employers and employees are the parties, individuals are the principals. While unions still function, legally they have been marginalized. Jim Stanford, at the Australia Institute's Centre for Future Work, has provided evidence that from the mid-1970s, the number of strikes by Australian workers has decreased by 97 percent. He argues that this goes a long way toward explaining the marked decline in wages which prevails. Just as Gordon Anderson had concluded in his review of the New Zealand system, an Australian scholar, Michael Quinlan, has observed that

“attempts to decollectivize employment regulation and promote individual contracts in Australia are reminiscent of earlier master and servant laws.”

In North America, the Wagner Act model was always going to make it easier for employers to push back. Unions had never won the kind of legal and political standing they had won in the antipodes, nor their wide coverage of the workforce. As employers in the US mounted their assaults, they were encouraged by conservative politicians. The Reagan attack on the air traffic workers was pivotal.

The workers’ union (PATCO), after not getting what it wanted in negotiation, had called a strike in August 1981. It was an illegal action because, under the very restrictive terms of the *National Labor Relations Act* (the implementation of the Wagner model), it was unlawful for public sector workers to strike. An injunction was issued, ordering PATCO to stop striking. PATCO’s refusal led to the union being held in contempt, and, subsequently, it was deregistered. President Reagan sacked all PATCO members, staffing air traffic control towers with defence force personnel and retired workers. The intention and impact were clear.

In his tellingly entitled *Reagan’s Terrible Swift Sword* (incorporating a line from the Battle Hymn of the Republic), Donald J. Devine, a former director of the US Office of Personnel Management, wrote: “When the President said no, American business leaders were given a lesson in managerial leadership that they could and did not ignore.”

Employers, with their spine stiffened, took advantage of the new mindset (that, as seen, was pushed by many intellectuals and think tanks) to insist on a fuller exercise of their residual prerogative of management over their private property. They claimed that the advent of globalization, the intensification of competition, the forging of free trade agreements, and the associated increased mobility of goods, services, and production enabled by novel technologies forced them to have work done differently, done in different locales. The plant-by-plant Wagner Act model was too rigid. Employers began to undermine it by shifting production to where it did not apply. Even if they stayed where they were, they splintered the workforces. They no longer hired people to be employed for indefinite periods. Increasingly, they turned to employment agencies, temporary visa workers, part-time workers, casual workers, forms of franchising. Later chapters will take up these developments; for the moment it suffices to note that all this

made the collective bargaining model based on permanent employees represented by a union much less relevant than it had been. In the US these departures from the scheme associated with Les Trente Glorieuses have been a major reason why, in the private sector, union membership is now miniscule. The OECD Statistics Extracts, 2011, report that during the period 1960–2010, US unionization rates had fallen from 31.9 percent to 6.9 percent.

In Canada, there was no Reagan, but the message he and his followers sent was strong. Largely this was because the two economies are tied so closely. Many major employers are US subsidiaries; many unions are part of an international union, that is, a US parent and Canadian branches. The political and intellectual integration is very tight. US developments infect Canadian ones. In 1979, the Canadian government, mirroring UK and US developments, attacked the militant post office workers to show private employers the way forward. This strategy was embraced by all the provincial governments and future federal ones. All of them asserted that they were impelled to become more efficient. Therefore, they claimed, the rendering and delivering of services should be left to the for-profit sectors whenever possible. They reduced the number of their public sector employees and curtailed the right of the remaining ones to take collective action. Frequently those who still had this right were ordered back to work by special legislation. All of this has been carefully documented by Leo Panitch and Donald Schwartz. Their work painstakingly records the intensification of the assaults on public sector workers, both to further the privatization and deregulation policies of governments infused with the Hayekian dream of getting the State out of the business of redistribution, and to put some backbone into private employers. It was intended to, and did, push employers to use the coercive powers that inhere in their control over the means of production. And, as readers would now anticipate, the judges played their traditional anti-collectivist, anti-worker role.

In 1982, Canada embedded a US-style bill of rights into its Constitution, the *Charter of Rights and Freedoms*. Among the rights that were guaranteed to be protected from government assault were free speech and freedom of association. When governments took away legislatively granted bargaining and strike rights from public employees, public sector unions turned to the courts to have these attacks declared unconstitutional. In the first eight

cases that made it to the Supreme Court of Canada, the unions lost. It took nearly thirty years of litigation before the Supreme Court proclaimed that the freedom to associate guaranteed by the *Charter* did include the right to bargain collectively. By then the damage to private and public sector bargaining had been done. While, in Canada, the rate of unionization is still higher than it is in the US, it has fallen precipitously in the private sectors and wages have remained low and stagnant. Toronto-based journalist Laurie Monsebraaten records that poverty among working people is very high. Between 2001 and 2006, the number of working poor increased by 46 percent, and it has increased since. This correlates with the decline in private sector union density; from the mid-1980s to the early 2000s, it fell from 26 percent to 18 percent. The trend continues, falling to 16 percent by 2011. What has remained constant has been public sector unionization, giving the impression that Canada's assault on collectivism has been gentler than that in the US. But here it is to be noted that, until just recently, those collective bargaining rights of public employees have been very feeble, and even now that the judges have decreed that their right to strike is protected by the *Charter*, the same judges decreed that, should a legislature remove the right to strike and replace it with another acceptable dispute settling procedure, governments should not be thwarted by the Constitution. Given the political mindset of current Canadian governments, public sector workers remain, *in legal terms*, severely handicapped.

In the United Kingdom, the fight-back by capital got a big boost from the election of the Thatcher government. It made no secret of the fact that it wanted a return to the good old days when the State was mindful that people should rely on themselves and governments should not supply them with entitlements that would make them less eager to offer themselves cheaply to employers. It wanted to promote the virtue and superiority of individualism over collectivism. The attacks on what the Conservatives liked to call the Nanny State were many, and, when Margaret Thatcher got the opportunity to go after unions, she did so with zeal.

The occasion was the coal miners' strike of 1984. The government had anticipated the strike, as it had announced it wanted to privatize the then nationalized coal industry and had built up stockpiles of coal. When the strike began, the government was able to have it labelled an illegal strike because, even though there had been a ballot among the miners, the

conducted ballot did not meet the formal legal requirements. This helped the government to use all its State powers against the union. The war raged for twelve months before the strikers were defeated. And it had been a war. There were many physical clashes between strikers, the police, and strike-breaking workers. Thatcher cut the welfare benefits of dependants of striking workers, and, as usual, courts proved themselves more than willing to issue injunctions against striking workers who interfered with scabs or organized flying pickets. There were allegations that the police had falsified evidence to support the bringing of charges against strikers, and, although these allegations were not proved in court, many cases against unionists were dropped by the prosecutors without trials being held. UK journalist Seumas Milne alleged that MI5, a security force, had tapped the telephones of the strikers' leaders and had engaged in undermining the union. While the veracity of many of these claims is still being debated, there can be no question that the government and its allies used any and every weapon they could muster to bring the strikers to heel.

On March 3, 1985, it was all over. The miners had been defeated. The fear of grand-scale closures which had impelled them to strike proved to have been well founded. In 1983 there had been 174 working pits; by 2009, only 6 were still operating. Immiseration had become commonplace in the former coal mine villages and townships.

All this has been widely written about and analyzed. This preoccupation is understandable because not only were the events dramatic and violent, but everyone knew what lay at the core of this bitter struggle. It was about what kind of a polity the UK was to become. Thatcher had made this as clear as it could be made. She referred to the militant union and unionism more generally as the "enemy within," a play on the expression she had used to justify her war over the Falklands. She frequently acknowledged her intellectual debt to Hayek and wanted to persuade all and sundry that there should be no fetters on profit-seeking and rugged individualism. To this focused and successful political warrior, it was not simply about creating a more efficient marketplace. Her belief that there was no such thing as society but merely a host of individuals, and that there could be no other way forward than by reliance on individual competitors striving to become wealthy, are all summed up in her famous slogan There Is No Alternative—TINA. The world had to be remade, and, to do this, people had to be

educated to accept the futility of redistribution by state action and the prioritization of self-reliance. As she said in an interview: “Economics are the method. The object is to change the soul.”

The impact of Thatcherism was at least as great as that of Reaganism. She established a new foundation for capital-labour relations, one which was not seriously challenged by the later Labour governments of Tony Blair and Gordon Brown. The social wage came under stress and unions became ever more marginal. As is the case in New Zealand and Australia, contemporary labour relations commentators in the UK acknowledge that the clock has been turned back. The sentiment is caught by the title of Paul Smith’s analysis: “Labour under the Law: A New Law of Combination, and Master and Servant, in 21st-Century Britain?”

This broad-strokes overview of a long period of struggle which, in the early stages, featured working class advances, indicates that the employing class has rolled back many of the workers’ victories. While the parallels drawn between the current mechanisms of adjustment of capital-labour conflicts and the vicious 19th-century Master and Servant regimes may be a little hyperbolic, the fact that the comparison is made by several Anglo-American observers is telltale. The three decades of blunted capitalism, Les Trente Glorieuses (occasionally called the Golden Age), are well and truly over.

Today there is little talk about the pluralism that supposedly made class-conflict arguments irrelevant. There is little support for the claim that workers are truly industrial citizens; there are few sanguine claims that employers and their workforces have truly shared goals. Indeed, those concerned with restoring the legitimacy of capitalist relations of production —luminaries such as Mark Carney, Larry Summers, Joseph Stiglitz, Amartya Sen, Jean-Paul Fitoussi, Pope Francis—are demanding that capitalists and policy-makers start including workers and the vulnerable sectors into the regime’s operations by returning some of the countervailing powers they had for a brief while.

Intellectual gatekeepers for the system are engaged in serious and important research. Some are trying to design new regulatory schemes by, say, redefining labour law (the old schemes being incapable of addressing the contemporary problems); others see the need to be more sensitive to the fact that capitalism can and does operate in different guises and there is a

need to understand this variety to fashion appropriate responses. Some people see the corporation as a central actor and that it, therefore, must be re-regulated and made responsive, proffering new governance and accountability models, urging corporate social responsibility, and pushing for more worker participation in the running of corporations. Yet a different group concentrates on the development of international human rights and ILO Conventions in the quest to establish baselines of protection for the increasing number of hapless people in the world; somewhat overlappingly, some examine the large movements of dispossessed people and immigration and refugee laws to try to deal with poverty, precarity, and unrest. Others still are seeking to come to terms with the new technologies, and their potential uses and abuses, to determine whether they are merely new modes of production or portend the arrival of a new political economic system.

In this book, written from a lawyer's vantage point, the argument is that any future ameliorations that come out of all these disparate analyses and accompanying actions should be embraced. But it is argued that reforms that do not challenge the legitimacy and deep structural foundations that make capitalism what it is will not last.

## SUMMATION

1. The advances made by the working class as it rose from what appeared to be total defeat in the 1930s, while formidable when compared to the earlier stages of capitalism, were never that radical: they never seriously challenged the structures, ideology, and instruments that provided capitalism with its foundations.
2. This was particularly true of the much-acclaimed Wagner Act model in the US and Canada. It legalized a system of regulation that was said to acknowledge the legitimacy of "free collective bargaining." It was a great step forward in terms of the legal rights workers had enjoyed in earlier periods. The juxtaposition of the new to the old suggested that more had been won than had actually been won. The free collective bargaining only ever envisaged a limited sphere of struggle over terms and conditions. After all, in theory, collective bargaining could have been seen as involving agreement-making between capitalists and all of the working

class, or all members of the capitalist class in a designated sector of production and all the members of the working class in that sector (seen as elemental by the Wobblies); or as between individual capitalists and all members of the working class ("an injury to one is an injury to all" was once a popular slogan); or as between individual capitalists and unions representing the workers in that industry (industry-wide bargaining often claimed, rarely permitted); or as between individual capitalists and their employees represented by a union (the model originally chosen in the US and Canada, more favoured in the UK now than it was not so long ago, and being adapted in New Zealand as this is being written); or as between individual capitalists and their employees represented by a friend, family member, or organization, not necessarily a union of their choice (the current Australian situation); or as between individual capitalists and a token number of employees who bargain on behalf of themselves and future employees (as permitted in Australia). The individual employer and its own workforce bargaining scheme—much favoured currently—is only one step above bargaining between individual employers and their individual employees (as permitted now in New Zealand and Australia) which is not *collective* bargaining in any sense. The Wagner Act and all other models started on a pretty low rung of this ladder of possibilities.

3. Columbia Law School professor Katharina Pistor has argued that the universality of the sanctity of private property and the attributes and facilities that are associated with it—freedom of contract and the privileging of individualism over collectivism—are what enables capitalism to thrive, to endure, to protect itself from fatal attacks. And, as she argues, these fundamental elements for capitalism's survival are "encoded" in law. This chapter, and those which follow, demonstrates that law plays a significant role in the maintenance of these crucial—to capitalism—structural pillars and their attendant ideology. Any reforms made by means of legislation or litigation under the existing legal system that maintain the private property / private contract paradigm will permit capital to retain the structural and ideological basis which it needs to fight back. And fight back it did and always will. Fiercely.
4. The logic of the value of private accumulation of socially produced wealth justifies the waging of class war from above by capitalists, for that is what it has been. As that respected sage of capitalism Warren Buffett

said: “There’s been class warfare going on for the last twenty years, and my class has won.” It is not hyperbole. It is understood by thinking capitalists and by suffering workers and their families to be a truism. The more thoughtful of capitalism’s gatekeepers understand the militant resistance this might breed and offer carrots to have the working class accept and internalize the logic of capitalist relations of production. Individual capitalists, more concerned with their own welfare than that of capitalism, are unlikely to pay much heed to these thinking capitalists.

5. Workers and their allies cannot help but see and feel the impacts of what are, so politely, termed “austerity policies,” policies that amount to vicious attacks on the social wage. They cannot help but see and feel the way in which the workforces have become ever more fissured, making the old and promising collective bargaining models totally inadequate. Precarious employment, globally and locally, presents a picture of overall immiseration. It reminds many of the deprivations that prevailed in the earlier, unfettered stage of capitalism. Workers will, as they always have, fight back. Fiercely. But they must bear in mind that any gains they make within the structural and ideological framework of the law will be reversible as capitalists deploy the logic of that framework. Ensuing chapters elaborate these ideas.

CHAPTER 4

# *The common law's anti-collectivism and the impoverished right to strike*

The last chapter told the story of how gains made by working class activists were diluted as the employing class deployed multi-pronged strategies to these ends. The account noted that legal thinking and acting played their part in tilting the balance back in capital's favour, but did not provide chapter and verse on how this is done. This chapter complements that account by asking questions about the oft-ignored impact of the structural and ideological roles of law, particularly common law. It will be necessary to revisit some of the contentions made in the previous chapter. This may irk some readers, but I hope that it will help my self-set task to offer a deeper understanding of how the changes which came about were wrought.

I begin by noting the obvious, namely, that capital-labour institutions have developed differently in different polities and that this may be due to many factors, including the prevailing system of law. I then provide evidence that the common law's structural and ideological bases have put working class organization at a grave disadvantage in advanced Anglo-American capitalist political economies. Details are furnished as to how legal doctrines developed over a century or more ago laid down the ideas and ideology which continue to play a major role in ensuring that workers in the US, Canada, the UK, Australia, and New Zealand have to deal with considerable limitations on their capacity to use economic collectivism when they try to resist the political and economic power of the employing class.

In short: the story is that the *structural and ideological* features of common law affect the way in which legal *instruments* which directly regulate and shape capital-labour relations are drafted and applied.

*In our hands is placed a power greater than their hoarded gold*
*Greater than the might of atoms, magnified a thousandfold*
*We can bring to birth a new world from the ashes of the old*
*For the union makes us strong*

So runs the last verse of "Solidarity Forever," the famed workers' anthem as adapted by Pete Seeger. What that anthem teaches people as they sing it is that all wealth is created by workers and that capitalists need workers to generate profits. Workers have always instinctively understood that this capitalists' need can be translated into workers' power, but only if workers do not compete among themselves, if they stand together:

*Solidarity forever, solidarity forever, solidarity forever*
*For the union makes us strong*

In the competitive capitalist system, as idealized by its cheerleaders, all individuals are to be thrown back on their own resources. As individuals without any resources other than their intellectual and physical capabilities, workers must invest, that is, sell, these personal attributes. They have no choice. This contrasts sharply with the circumstance faced by the very few who own most of the means of production, the capitalists. They have a real choice. Owners may do as they like with their impersonal assets. Law makes sure of this.

One of the common law's basic principles is that the private ownership of property is to be as free from interference as possible. This leaves those who own these assets, those who own most of the wealth, with ample discretion as to when, where, how much, and for how long they will invest some or all of their wealth. They are free to determine how they can best attain their central goal, which is to maximize profits to accumulate even more wealth. One of the choices they have is not to invest any of it at all. They can survive for a very long time without using their existing wealth to produce goods and services. It gives them enormous economic and political leverage.

If workers compete as individuals with each other for scarce jobs, they will be forced to accept contractual terms and conditions which may leave

them impoverished. Liberal common law enforces all contracts between individuals no matter what the terms and conditions are if, in formal legal terms, they are the result of bargaining between formally equal—but not economically equal—parties. It treats any solemnly and seriously entered into agreement with employers as a voluntary one between sovereign beings, one whose terms and conditions are, therefore, not to be questioned by any outsider, such as a judge. There is, for the purposes of liberal legal philosophy, no such thing as a contract which delivers the "right" terms and conditions as measured by social justice. It is for the parties to decide what is right for them. Proper process is what is emphasized; substantive outcomes are not a concern.

Given persistent gross inequality in wealth, there is, therefore, no choice: workers are forced to find ways to reduce competition among themselves. They are forced to look for ways to counter the *legally* built-in clout of capitalists. The law lets the owners of private property decide, as sovereign individuals, how or whether to use their wealth. Legally, the owners of the means of production retain, as sovereign individuals, an unchallenged right to withhold their capital. In effect, they start off all bargaining with an unchallenged right to strike. Individual workers, as sovereign individuals, have a formally equivalent right to withhold their labour power. Obviously, in the absence of any other wealth, any individual's sovereign decision not to sell her labour power would give her no bargaining leverage whatsoever. Workers must find, and fight for, an effective response.

An old working class slogan says it all: "Dare to struggle, dare to win. If you don't fight, you lose."

Ideally, from the perspective of workers, they should be organized as a class. This is the only form of organization which will equip them to meet their adversary, the capitalist class, head-on. They know this. This is why they sing "For the union makes us strong." It is not just a romantic idea; workers have tried to make it work. In chapter two, a brief overview of capital-labour struggles in the late 19th and early 20th centuries was presented. The creation of organizations like the Knights of Labor and the Industrial Workers of the World (Wobblies) reflected workers' conscious efforts to establish a united front on the basis that any capitalist attack on any worker was tantamount to an attack on all workers. Capitalism was to

be confronted and rejected as a system which pervaded all facets of life. As noted in that earlier chapter, the Wobblies made their quest clear:

> The working class and the employing class have nothing in common…. Between these two classes a struggle must go on until the workers of the world organize as a class, take possession of the means of production, abolish the wage system, and live in harmony with the Earth…. Instead of the conservative motto, "A fair day's wage for a fair day's work," we must inscribe on our banner the revolutionary watchword, "Abolition of the wage system." It is the historic mission of the working class to do away with capitalism.

As chapter two documented, capital turned away this challenge to its reign, vigorously, often viciously. Workers were forced to lower their ambitions, but, as they had to do, they kept on trying to reduce competition among themselves. They formed unions, looking for means to make them effective, militant ones if possible. The employing class always resisted, and continues to resist, these efforts. Compromises have been forged which have yielded a set of legally endorsed institutions which allow for some unionization, some reduction of ruinous competition. The nature of the compromise reached at any one time, in any one locale, is never written in stone because such compromises are set out in legal instruments which can be changed.

The battles about the right of unions to exist, the legitimacy they should be accorded, how many workers they should be allowed to represent, about the nature and extent of any collective bargaining that emerges, about whether workers and their unions should have the right to strike and, if so, when, about what, for how long, are really battles about how class conflict is to be contained and managed at any one time. The rights and powers of the contesting parties wax and wane in any jurisdiction as capitalism adapts itself to the many different political, economic, cultural, and legal histories and arrangements it encounters around the globe. This means that there are many reasons why the always-contested capital-labour regulation and management scheme takes on different guises in differing jurisdictions. Law, it is argued here, is one significant factor in the design of any particular mechanism of adjustment.

Specifically, the argument is that, in the Anglo-American sphere, law makes it easier for the owners of the means of production to rein in the working class than it is for them to do so in other polities. It is very difficult for Anglo-American workers to establish enduring, effective, and militant trade unions, for workers to gain bargaining institutions which promote wide coverage of the working force, in sum, it is very hard to win a politically and economically meaningful right to strike.

## THE CURRENT STATE OF PLAY IN ANGLO-AMERICAN JURISDICTIONS: A COMPARATIVELY ENFEEBLED RIGHT OF WORKERS TO ACT COLLECTIVELY

The OECD has produced a typology of the varieties of capital-labour arrangements which have evolved. It identifies four major kinds of bargaining models in the countries that were studied, which included those in the Anglo-American sphere which are the subject of this book.

The OECD shows that, in some jurisdictions, there is a system of bargaining which it terms "coordinated centralised bargaining." This system makes it much easier for workers to reduce competition among themselves than it is in other jurisdictions. For instance, in Belgium, Finland, France, Iceland, and Switzerland, bargaining is done by means of highly centralized negotiations intended to cover whole industries or occupations. These centralized negotiations involve many unions and employer associations and government agencies. The negotiations set the basic terms and conditions which govern all employers and workers in an industry or identified occupation. In this kind of setting, workers are about as far away from being forced to bargain as atomized individuals as modern capitalism will tolerate. This arrangement correlates very strongly with more security in employment and a richer social wage.

At the other end of the spectrum, the OECD places jurisdictions which it describes as "firm-level collective bargaining" regimes. Most collective bargaining takes place at the firm or plant level. This makes it much more difficult to set widely applicable standards as many, indeed most, workers will not be employed by a firm which is required (by law or by the presence of a persistent union) to participate in any kind of collective agreement-making. Many workers are left vulnerable because, uncollectivized, they cannot match the raw economic power of their employers. Among the

countries which fall into this category are Chile, Hungary, Latvia, and, importantly, Australia, New Zealand, Canada, the US, and the UK.

As the period we have come to call neo-liberalism has taken hold, capitalists—taking advantage of new technologies, the tearing down of trade barriers, the increasingly unfettered mobility of finance capital, and the capacity to produce goods and services by knitting together activities in globally dispersed locales—have eagerly brought pressure to bear as they pursue their never-changing goal to reduce the number of workers covered by collective agreements, to force workers to compete as individuals. The OECD reports that employers have had much less success in nation-states in which coordinated centralized systems have evolved than in those in which firm-level collective bargaining prevails.

Taking 2010 as its base year, the OECD reports that there actually had been an increase in the number of workers covered by collective agreements in coordinated centralized collective bargaining system countries. Starting from a very high base in 2010 when 82.2 percent of workers were covered by collectively reached agreements, the number of workers enjoying the terms and conditions provided by collective agreements had risen to 83.3 percent by 2018. In sharp contrast, the already low numbers of workers covered by collective agreements in firm-level bargaining jurisdictions in 2010, some 20.7 percent, had dropped to 18.4 percent by 2018. As seen, this group of nations includes the Anglo-American polities.

Other types of collective bargaining regimes were identified by the OECD. One features some coordinated collective bargaining leavened by a good deal of local flexibility to allow modifications and adaptations of central agreements. It is a blend of coordination and decentralization. Another type of scheme is one in which firm-level bargaining dominates but is made less painful to workers, as there is some leeway to displace firm-level bargaining by some sector-wide collective agreement-making. Both are steps down from centralized coordinated collective agreement-making and steps up from firm-level agreement-making. The OECD reports that, in these two in-between models, the number of workers covered by collective agreements remained well above that found in firm-level bargaining regimes, such as the UK, the US, Canada, New Zealand, and Australia. In the countries categorized by the OECD as operating within a

coordinated but somewhat decentralized model, 77.9 percent of workers remained covered by collective arrangements. In the category of countries listed as enjoying some sectoral bargaining, the number of covered workers was significantly less, at 33.1 percent, but still way ahead of the countries characterized as living primarily with the firm-level model, with a paltry 18.4 percent of their workforces having the benefit of collectively reached terms and conditions.

No matter which variety of capitalism is practised, capital is always looking to push back any concessions it has been forced to make. The failure of the employing class to erode the capacity of workers to bargain collectively in centralized coordinated systems is not for the want of trying. A *Global Labour Column* article by T. Schulten reports that the European Commission had recommended that an assault be launched on both centralized and somewhat centralized collective bargaining which prevail in so many European nations. The goal was "to promote firm-level and/or individual bargaining," "to decrease bargaining coverage," and "to decrease the ability of trade unions to play a part in wage-setting." This European Commission report was published in 2012, responding to the demands of dominant financial EU institutions, commonly known as the Troika, constituted by the European Commission, the European Central Bank, and the International Monetary Fund. The Troika, impelled by the 2007/8 financial crisis, had forced Portugal, whose workers had enjoyed collectively bargained-for industry-wide agreements, to stop extending the application of such agreements to non-participating employers in the industry. The OECD found that, as a result, Portugal, alone among the nations which it had included in its centralized coordinated collective bargaining category, suffered a sharp reduction in the number of workers covered by collective agreements. More dramatic was the case of Greece. The OECD had included Greece in its list of countries which featured coordinated bargaining on a sectoral basis. The Troika forced the Greek government to attack its debt and to impose a new set of social relations, that is, to become a different variety of capitalism. As part of that, Greece's sectoral collective bargaining scheme was ripped apart. The number of workers covered dropped by an astonishing 85.8 percent between 2010 and 2018. All the other nations classified as coordinated sectoral bargaining

jurisdictions by the OECD also reported a reduction in the number of workers covered by collective agreements.

Importantly to the theme of this chapter, in those nations which the OECD found to rely principally on firm-level bargaining, the already small number of workers covered by collectively bargained-for terms and conditions dropped further. Only one of them, New Zealand, showed an increase in covered workers, from 15.6 percent to 19.2 percent, between 2010 and 2018. This was an exceptional outcome, but, even so, it still left a stunning majority of workers to their own devices, to fight without the protection of collectivized bargaining. In all the other countries in the firm-level bargaining cohort, the losses—given the starting point—were significant. Most interesting to us here are the following: The US lost 1.4 percent of the number of workers covered by collective bargaining, reducing the number of workers protected by collective bargaining to a startlingly low 11.7 percent. In the UK, the loss was 4.9 percent, leaving 74 percent of workers uncovered by collective agreements. In Australia, 11.5 percent of its covered workers were cut off from collectivized bargaining, more even than in Estonia, which lost 9.6 percent of the workers benefiting from collective agreements.

It is clear that the system of bargaining which has evolved in a jurisdiction has immense impacts on the well-being of workers. All in all, firm-level bargaining, the mode which currently characterizes the US, the UK, Canada, Australia, and New Zealand, produces an employer/employee balance which favours the employing class more than do other modes of adjustment of capital-labour conflict. The question that arises is: What has made these polities so inhospitable to the adoption of mechanisms of capital-labour adjustment which approximate centralized coordinated collectivized bargaining, to a model of bargaining which allows more workers to reduce competition among themselves and which makes it harder for capital to force workers to compete more fiercely for jobs? It is a puzzle because, as will be shown, for long periods, some of these polities might have been slotted into the OECD’s centralized coordinated collective bargaining category. But today their workforces are well and truly removed from the protections which that model affords.

It would be presumptuous for me, a lawyer, to try to provide a definitive explanation. A more limited exercise is undertaken. It is argued that, by

focusing on the nature of the legal system (itself a product of political, economic, and cultural history and integral to its shaping and perpetuation), a credible explanation emerges of how and why a nation-state politically supports and maintains one system of capital-labour relations rather than another. This thesis gains support from a strand of a genre of scholarship known as Varieties of Capitalism (VoCs).

## VARIETIES OF CAPITALISM AND LEGAL ORIGIN THEORY

The Australian labour scholars Meredith Jones and Richard Mitchell contend that there is an identifiable link between the nature of the legal system and the variety of capitalism which is spawned. They conclude that, where civil law reigns (as it does in the European Union), the variety of capitalism is most likely to be one which the VoC literature refers to as a coordinated market economy, one that is characterized by a more fettered, a more directly regulated market. Such political economies feature capital-labour relations which are described as relational/insider ones, in contrast to jurisdictions where the common law is the dominant legal system. These jurisdictions are categorized as liberal market economies, ones in which the market is much less confined and restrained by political intervenors. In these political economies, Jones and Mitchell find, the capital-labour entente is one which can be described as a market/outsider one.

In the language of this chapter, a civil law system helps produce and maintain a mechanism of adjustment in which capital treats labour as an institution rather than a mass of atomized individuals. This is what is meant by talking of a relational/insider system. The common law pushes in the opposite direction. Where the common law reigns, the mechanism of adjustment is one which leaves more to individual competition. The sellers of labour power are expected to participate as individual market actors, that is, it is what Jones and Mitchell term to be a market/outsider scheme.

The next section elaborates how the common law judiciary promotes and safeguards the structural bases and ideology which favour individualism over collectivism and, thereby, the employing class over the working class or, to use the above language, advances the embedding of a market/outsider regime of labour relations. The argument is not that the legal origin of a system plays a determinative role, but that there is a great

correlation between what kind of a legal regime prevails and what kinds of adjustment systems are likely to develop.

## COMMON LAW JUDGES: DETERMINEDLY ANTI-COLLECTIVIST

I begin with a hypothetical commercial dispute of a kind which frequently hits newspaper sports and business pages.

A sporting body has put the exclusive rights to telecast its popular games on the market. Two television channels bid for those rights. Each will try to convince the sellers that it is offering the better deal. Manifestly each is trying to gain by hurting the other. To market capitalism, it is just the way things should be done. To the law, too, this is impeccable behaviour. Law sternly defends the right of owners of property to use their resources as they see fit, to pursue their own interests as they choose. This sentiment has been internalized by much of the public. Thus, while the sport-watching public may well prefer one outcome to another, they will not be troubled about this fierce competition.

Of course, some tactics will be unacceptable. This is ancient law. In 1706, a man kept decoy ducks in his pond. His idea was to attract other ducks which he could capture and sell for profit. A neighbour let off his shotgun to frighten away any real ducks who might be fooled by the decoy ones. He had to compensate the man who now claimed that he had deployed his decoy ducks in vain. In another case, decided in 1794, a ship's master fired a cannon shot at people identified as "natives," to stop them from trading with a nearby rival trading ship owner. The latter succeeded in his claim for losses against the cannon-firing rival. (No one seemed to be too bothered about the "natives" who were shot out of the water.)

In neither case was the violent behaviour aimed at the successful plaintiff. It was simply the plaintiffs' right to enjoy fair self-serving conditions that was being protected against the defendants' choice on how to pursue their self-interest. The issue as to when the law will say that the tactics used by competing selfish people are unacceptable requires the drawing of lines. It is hard for outsiders, such as judges, to decide what is fair in a fight between two sovereign parties. In a 1942 case called *Crofter Handwoven Harris Tweed Company Ltd.* v. *Veitch*, Lord Wright wrote:

> We live in a competitive or acquisitive society, and the English common law may have felt that it was beyond its power to fix by any but the crudest distinctions the metes and bounds which divide the rightful from the wrongful use of the actor's own freedom, leaving the precise application in any particular case to the jury or judge of fact.

Although they are conscious of the fraught nature of exercising their discretion in these kinds of cases, judges have been forced to draw lines between wrongful and permitted pursuit of self-interest. It will be seen that the way in which they have exercised their discretionary powers has benefited employers as a class. A sketch of a long journey follows. Regrettably, it involves some rather tedious legal nitpicking which often may feel as if I am looking for bones in tofu. I do think, however, that a closer examination of the way the judges go about their business helps make the point that the nature of common law decision-making has a pronounced influence on what we have come to believe constitutes an acceptable mechanism of adjustment of capital-labour disputes in the Anglo-American polities.

I begin this rather technical examination with a case decided by the House of Lords in 1892, *Mogul Steamship Co.* v.*McGregor Gow & Co*. It raised a similar problem to that presented by the hypothetical dispute between TV stations over telecasting rights of sporting events. An association of ship owners operated in Asia. Their business was to ship locally produced tea to England. They used dealers to get them contracts with the local producers. They did not want a rival ship owner who was not a member of their association to get any contracts. To this end, the ship owners' association asked one major dealer to refuse to facilitate contracts between tea producers and the rival ship owner. The dealer was told that, should he aid the rival ship owner, not one single member of the association would ever give him any of its business again. In other words, one of the sides to the competition played hardball. The non-member complained that this was an unacceptable way of competing. The House of Lords held that he had no legal cause to complain, as all that the defendant association of ship owners had done was to pursue their own interest with vigour. Good for them, said the court.

On the face of it, this should have been a decision which would give workers who wanted to pursue their interest as collectives ground for optimism. After all, the successful ship owners had used their collective strength to attain their goal. But four decades earlier a court had handed down a decision which laid down ground rules that, sooner or later, were bound to make it very difficult for workers who were pursuing their interests to play the kind of hardball engaged in by the ship owners.

*Lumley* v. *Gye* was that decision. The dispute to be resolved arose after Benjamin Lumley, the manager of the Queen's Theatre, had scored a bit of a business coup. He had engaged the much-admired opera singer Johanna Wagner to perform exclusively at his theatre for a specific period. Frederick Gye, the manager of the rival Covent Garden Theatre, then persuaded Johanna Wagner to perform for his theatre during that very period. He made an offer to Johanna Wagner which she found irresistible. Seemingly, Gye had outcompeted his rival Lumley. In riposte, Lumley sued Gye to recover his losses. He won.

Gye, when setting out to hire Johanna Wagner away from Lumley, had neither shot at her to frighten her from going to work for Lumley, nor prevented her by force from honouring her solemn promise to Lumley. Gye had not even occupied the premises in which Wagner was to rehearse and perform to make it impossible for her to do her work. There had been no physical interventions of any kind.

All that Lumley could complain about was that the other theatre manager had done exactly what he did: make Johanna Wagner an offer she hopefully would find attractive. How could a court rule, as it did, that this was analogous to making her contractual duties physically impossible? The judges sitting on this case in 1853 used their considerable discretion and imagination.

They turned to the 1351 statute enacted to deal with the shortages of labour due to the Black Plague. As discussed in chapter one, that legislation forced those of a special status, namely those without land or belonging to a craft, trade, or merchant guild, to work for whosoever asked them to do so. Not only was it a criminal offence for such lowly people to refuse, it was a crime to leave without permission and a crime for another to entice them away from a master to whom they were obligated. It was, in other words, a public wrong to entice servants to leave their masters. Somehow, five

hundred years later, the judges felt that this provided legal grounds to allow Lumley to bring a private civil action in damages against Gye, the rival theatre manager. It was quite a stretch.

Johanna Wagner was not a servant in the way that that word was understood in the Black Plague law (and in all the pieces of legislation which followed in its footsteps). She was not a dispossessed person, one without wealth or standing. The opposite: she was something of a celebrity, feted and in demand. Her ability to make choices as to how she was going to use her resources was much more like Lumley's or Gye's than it was like that of 14th-century workers without land, craft, or trade. She was a famed mezzo-soprano, a niece of Richard Wagner. Her uncle had chosen her to be the original performer of the principal role in his new opera, *Tannhäuser*, and she had been slated to be the first Brünnhilde in The Ring. This is why Lumley wanted her to perform exclusively for his Queen's Theatre and why Gye wanted to poach her. Unlike the desperate, forced-to-work-for-a-living servile classes subjugated by the 1351 law, Johanna Wagner had choices of whom she wanted to work for and when she would do so. She was as close to the idealized sovereign autonomous individual whose contractual decisions should be respected as anyone possibly could be. To expand the old statutory regime's definition of a servant to include her was, to say the least, bold. Particularly as there was no need to do so if justice for the wronged Lumley was the court's concern.

The contract which Lumley had concluded with the opera singer was valid and enforceable. She had violated it. Lumley could go to a court and claim that this violation was going to inflict irreparable damage and have the court issue an injunction, forbidding Johanna Wagner from working for anyone else.

The law does not give a disappointed contractor the right to demand specific performance of a contract which requires personal performance by the other contractor. It would not make an order that Johanna Wagner had to sing for Lumley. It would be an assault on the principle which makes contract law the sacred institution that it is; it would negate the sovereignty of the parties to a contract. But note that in this case (and in most cases like it), a specific performance order would have yielded the very result an injunction preventing Wagner to sing for Gye would have reached. Once Wagner was not permitted to work for Gye or anyone else for a given

period, she would not be able to earn a living if she did not perform the original contract. So the right to obtain an injunction gave Lumley a functionally effective remedy. And Lumley had yet another tool with which the law supplies an aggrieved contractor, namely, a breach of contract action.

It is the parties themselves who create the duties and rights that govern their personal contract. This is why, in addition to being able to enjoin Johanna Wagner from working for anyone else, Lumley had a *personal* right to sue her for the losses she had inflicted on him by her agreement to perform for Gye. She had reneged on an obligation that she had voluntarily undertaken. This should have given pause to judges who were relying on a feudal law to justify their reasoning. Under the feudal law, servants were compelled to work; there was nothing voluntary about it. They had a public obligation to work. Servants who left their employ governed by the Black Plague and like laws without permission were committing crimes (as they were under Master and Servant laws which were still alive and well in 1853). Johanna Wagner, who deliberately violated her employment contract, had not committed a crime.

The 1351 law was the implementation of a public policy designed to ensure a reliable supply of labour power to feudal landowners. It made sense to punish those who undermined the scheme. It made sense to treat as criminals those who asked others (the enticed workers) to act as criminals. None of this made any sense in the competitive capitalist system that was maturing as the *Lumley* v.*Gye* case was being decided. Johanna Wagner had not committed a crime. Gye had merely acted according to the lights of competitive market logic. If he was to be held responsible for the harm inflicted on Lumley, it would be tantamount to holding that his competitive zeal was an actionable wrong. To do so involved the suggestion that Johanna Wagner had little or no agency, that she was not a sovereign autonomous individual. After all, Lumley and his Queen’s Theatre would not have suffered any loss if she had ignored Gye’s blandishments. Yet, the majority of the court held that Gye was to be held responsible for Lumley’s and the Queen’s Theatre’s losses because of Wagner’s wilful action. It held, in effect, that the legally enforceable personal exchange of promises between Lumley and Wagner could also be enforced against a third party. Somehow or other judges saw principles which made sense in a different

time, when startlingly different circumstances and public needs prevailed, as relevant to the resolution of the triangular dispute between equally sovereign individuals, the two theatre managers and the vaunted singer.

This elaboration of the reasoning of the court is the stuff of law books and classes. It has been offered in some detail to lay the ground for the argument that the common law judiciary has a peculiar role in the workings of the polities in which it reigns. It plays this political role successfully while denying flatly that it does any such thing. This gives its decisions heft as they are presented as the product of reason, rather than prejudice and/or power. They purport to be bound by ancient principles. Thus, in *Lumley* v. *Gye* the judges looked for authorities which would render their judgments acceptable. How they choose their precedents is left to them. More often than not, as in this case, there is a range of choices. Here, they went back to a five-hundred-year-old statute dealing with the problems of a radically different world which, plausibly (but only barely so), dealt with similar problems. Manifestly, they had some unarticulated reasons for their strange selection. To add to this tale of the width of discretion given to common law judges, once they have found an analogy, they have a lot of freedom on what similarities and differences they can emphasize. In short, they are relatively free to pursue agendas and, as they do so, influence other people's views and agendas. In *Lumley* v. *Gye* the judges set out to give special, extra protection to contractual arrangements, over and above those already endorsed by existing law. Clearly, they were wanting to emphasize the value they, and society, placed on individual contract-making, that is, on a central legal institution needed for the maintenance and perpetuation of capitalist relations of production.

In *Lumley* v. *Gye* the judges substituted a civil action for a criminal one; they equated an action to be initiated by individuals to serve their personal interests with a criminal procedure undertaken by public prosecutors on behalf of the public's interests. That seemed like a lot of twisting and turning to reach a result which went beyond any that had been handed down before. More, as will be seen, this stratagem of transliterating a type of conduct once stigmatized as criminal to a civil wrong has become a handy tool for a judiciary hell-bent on constraining collectivism as much as possible.

Here another intriguing point about how legal methodology works needs to be underlined. One of the points made in the analysis of the case was that the three parties were individuals. It was not, on its face, a clash between capital and labour, not one focused on the right to use collective action. But as liberal law purports to reflect and uphold general principles which are then to be applied even-handedly, the principle easily becomes available in cases between different kinds of disputants engaged in superficially similar conduct. The holding in *Lumley* v. *Gye* signified that private, freely entered into contracts are so precious that they warrant extraordinary legal protection. This always was likely to spawn serious problems for collectivizing workers, for trade unions.

The threat to unions inhered in the decision because of what unions do. They seek to improve terms and conditions of employment by asking workers not to sell their labour power or, if they are already employed, not to work, that is, to break their contracts, or by asking other people to break their contracts with employers who reject the union's demands, or by asking such others not to supply recalcitrant employers with promised goods or services or not to purchase anything from them. In short, they are always pushing for breaches of contracts or edging very close to that position. This is what they do. So even though, on its face, the decision in *Lumley* v. *Gye* had nothing to do with unions, it was a potential menace to them. It was, without ever hinting that this might be so, an anti-union weapon waiting to be unleashed. It was not obvious at the time because unions and their collective actions were already legally reviled and restrained.

The decision came at a time when existing legislation still severely impeded workers' collective actions. Legislation, taking its cue from common law decisions, treated the mere fact of combining as a criminal conspiracy. On top of that, of course, the Master and Servant Acts, discussed in the previous chapters, made any violation of a contract by workers (but not by employers) a crime. Collective action by workers, then, was firmly inhibited. Gradually workers made some inroads. By 1853, when *Lumley* v. *Gye* was handed down, they had won the right to meet and agree to negotiate changes in their own pay and terms of employment. But any resort to violence, threats, intimidation, molestation, and obstruction which intervened with other people's freedom to work or to do anything they would otherwise choose to do remained criminal. The vagueness of

what was forbidden left workers in a weak position. From this vantage point, the potential of the *Lumley* v. *Gye* decision to hinder workers' efforts to act as collectives was just that: potential. There were plenty of other legal tools to contain workers. Unions had to fight back.

The harshness of repression gave workers political ammunition. It took a while, but, by 1871, the English Parliament, after a Royal Commission of Inquiry, enacted legislation which stated that unions were not unlawful just because of what they did. In the 1871 statute, unions were defined as associations in restraint of trade because their raison d'être was to put economic pressure on employers by threatening their ability to profit from engaging workers or entering into contractual arrangements with sellers and buyers. So defined, they could now register as entities of some kind and hold and deal with property, a symbol of legitimacy in a liberal capitalist polity. Of course, employers were still able to rely on the common law's criminal conspiracy doctrines, and this forced the legislature to pass the *Conspiracy and Protection of Property Act* in 1875. Unions were given special protection to make the 1871 statute meaningful. The 1875 legislation allowed associations in restraint of trade, that is, trade unions, to combine to negotiate terms and conditions of employment. Combining for other purposes remained a crime. An envelope of protection had been carved out as law was now partially immunizing unions from the laws of the land designed to protect public order. Negotiating for workplace agreements was given a safe haven. The zone of protection was enhanced when, in 1875, the Master and Servant Acts were finally removed from the statute books.

Imprisonment, whipping, and deportation when agitating for better terms were no longer on the legal agenda. Unions could protect and use workers' membership fees to represent them when negotiating with employers. Of course, any ensuing agreement was not enforceable in the courts. It was still considered one bridge too far to ask the bastion of individualism, the judiciary, to endorse terms and conditions born from *collective* action as if they were just like terms of a contract between sovereign *individuals*. But progress had been made. Acting in concert was no longer anathema to the law and the political system. The courts appeared to have bowed to the inevitable when they decided in *Mogul Steamship Co.* v. *McGregor Gow & Co.* that ship owners could act in concert to pursue

their self-interest. It might have been thought that if workers did the same thing, they, too, should be forgiven. Yet, appearances to the contrary, it turned out that the courts had not ceded all that much ground when it came to workers' combinations. They were always eager to act on their mantra: individualism good, collectivism bad if property owners were adversely impacted. As always, as they pursued their political preferences, they merely pretended to read well-established law neutrally. The hypocrisy was on full view in a decision by the House of Lords in a 1900 case named *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants*.

In that case, the judges noted that the legislature had bestowed some status on trade unions in 1871, a status which the common law previously had denied them. This, contended the House of Lords, made it logical for it to hold that it was acceptable for aggrieved persons to sue a trade union as an entity, something which could not be done when it was an unlawful and legislatively unprotected association in restraint trade. This "neutrally" made argument put unions' property at risk whenever they engaged in conduct which was unprotected by law. This slick reasoning threatened to put the unions' hard-fought-for legislative gains in peril. Indeed, the pro-employer payoff was almost immediate.

In 1901, in a case called *Quinn* v. *Leathem*, the House of Lords held that a union, as well as its officials and members, could be held liable in civil conspiracy. A union had warned an employer, a meat-providing firm, that it would take action unless it required all its employees to be members of the union. When the employer had refused, the union asked other firms which regularly purchased meat from the employer not to do so anymore. When some of these firms acquiesced, the aggrieved employer brought the legal action, arguing that a *civil conspiracy* had been committed. The highest court in the land agreed and threw unions back into the abyss in which the courts had made them dwell in the earlier part of the 19th century.

Once again, the judges had transliterated a de-toothed criminal offence, *criminal conspiracy*—eliminated by statute in 1875, as noted above—into a tort, in much the same way as the courts metamorphosized the Black Plague crime of enticement into the actionable tort of inducing a breach of contract. The remedy fashioned had a serious effect on the defendant, here the union. It allowed a court to issue an injunction to cease and desist from engaging in the conduct which had been deemed to constitute a civil conspiracy.

Failure to abide by that order would lead to a contempt of court conviction, accompanied by many of the sanctions associated with a conviction for a crime. As time is everything when workers strike, this was a near-fatal blow. Once again, a statute enacted by an elected body which was intended to safeguard a combination for workers had provided a non-elected set of manipulative judges with the means to constrain workers. This judicial anti-worker approach was justified, as always, by the judges' insistence that they were merely applying basic legal principles as they found them. This must have sounded hollow to many contemporary observers as, to reach its decision in *Quinn* v. *Leathem*, the House of Lords had to avoid the intent and meaning of other significant decisions rendered by other supposedly equally respected judges.

In 1898, a mere three years before its decision in *Quinn* v. *Leathem*, the House of Lords had rendered its judgments in *Allen* v. *Flood*. Two unions were fighting over whose members were entitled to be employed to perform certain tasks. Allen, a steward, with his union's blessing, went to see the employer one evening and told him that, unless the rival union's workers he currently employed were replaced by those of Allen's union, the employer would have to face industrial action. The next day, the employer did not ask the workers he had used to come back to work. He was not contractually bound to do so, as the workers were hired on a daily basis. A majority of the deciding judges in the House of Lords held that Allen, the steward issuing the threat, had not committed any actionable wrong. While it was obvious that he wanted to harm the rival union and its employed members, his malice did not make his menaces unlawful. He was merely serving his (and his union's) interest and, absent a separate unlawful act, this pursuit of self-interest did not create a right in another to hold him responsible for any harm suffered.

How, then, did the House of Lords in *Quinn* v. *Leathem* come to hold the union which was pursuing its interest in promoting a unionized workplace—as Allen had on behalf of his union—legally liable?

One answer which suggested itself was that Allen had acted as an individual. While he was acting with the support of a collective, he alone engaged in pressuring the employer to get rid of specific employees. The distinguishing and justifying reason for the apparently contradictory results, then, would be that acting in concert is legally more reprehensible than

acting for oneself, even if the engaged-in conduct has the same purpose, is impelled by the same intent, and is carried out with similar malice. While intuitively this might be perceived as a sound way to justify the different results in *Allen* v. *Flood* and *Quinn* v. *Leathem*, legal logic, a logic which purports to treat like cases alike, makes the explanation problematic. In *Mogul*, the ship owners' case, it was decided that the mere fact of combination when pursuing self-interest did not make the conduct actionable if it was not accompanied by any other unlawful act. Clearly the fact that the *Allen* v. *Flood* decision could yield a different result to that reached in the *Quinn* case did not pass the then existing pub test (of what an ordinary person would think), let alone the demands of legal scientific reasoning. Inevitably, critical students of legal history attributed bad motives to the supposedly neutral, above-politics judiciary of those times.

Pro-working-class scholars—Edward Sykes, William Wedderburn, John Griffith, John Fleming, and many others—have argued that these three cases, popularly referred to as a "trilogy" by labour lawyers, are irreconcilable if legal methodology is taken seriously. Of course, at the time, the decisions had troubled unions, workers, and politicians, including some who were not particularly worker-friendly. There was both anger at the judiciary and concern for its legitimacy. It was obvious that the courts, supposed to apply the law even-handedly, were not doing so. Fortifying this belief was the candour of Lord Halsbury, who, writing in the *Mogul* case, stated that actors engaged in capitalist practices must be allowed to hurt competitors. He noted that, when trying to beat out a rival, they could not do so without having formed the intent to benefit at the expense of the rival's loss. In a competitive capitalism setting, this could not be a wrong:

> If such an injury, and the motive of its infliction, is examined, and tested, upon principle, and can be truly asserted to be a malicious motive within the meaning of the law that prohibits malicious injury to other people, *all competition must be malicious and consequently unlawful, a sufficient* reductio ad absurdum *to dispose of that head of suggested unlawfulness*. (emphasis added)

The fact that, in the *Quinn* decision, the House of Lords thought that setting out with the intent to hurt another (here, workers combining to

pressure an employer) gave the right to the employer to sue the union and its members made it plain that some combinations were fine, others not. The judges had chosen their friends and enemies.

As if to drive their legally troublesome approach home amid the agitation caused by the trilogy, the House of Lords took up the cudgel on behalf of capitalists immediately after its judgments in the *Quinn* case. In 1905, their Lordships were asked by employers to deal with workers who had taken collective job actions. The case was *South Wales Miners' Federation* v. *Glamorgan Coal Co.* Coal mining workers had an agreement which pegged their pay to the price coal fetched in the market. The rates were set on a sliding scale. To stop their pay from falling during a market downturn, the workers agreed to lower the production of coal, hoping the resulting shortage of supply would keep its market price, and thereby their wages, up. The court had no doubt whatsoever that the workers' main intent was to attain their goal, that they bore no malice toward their employers. Indeed, the judges accepted the union's assertion that they had believed that some of the employers would be pleased if the price of coal could be kept at an elevated level. Nonetheless, the House of Lords held the workers' campaign to control production by acting in concert was a wrongful and actionable conspiracy. The union and its officials had induced workers to breach their contract of employment. The potential of *Lumley* v. *Gye* had come to roost.

As seen, *Lumley* v. *Gye* had made the inducement of contract of employment a tort, a civil wrong. Now it was held that that 1853 decision, based on a curious adaptation of a 1351 statute, did not allow the defendants to claim that there was some justification for the conduct which amounted to an inducement of a breach of contract. This combination of workers pursuing their own interests did not get the favourable treatment a combination of ship owners had. Thinking lawyers and politicians were seriously embarrassed.

To make matters worse, during this period of English judges baring their anti-worker-collectivism teeth, they rendered another common union strategy almost unusable. One of the tools available to workers in struggle with their employer is to communicate to other workers, suppliers, and purchasers and the general public that they are being treated unfairly by an employer and that they would welcome support. They picket. They form

lines outside businesses, hold placards, talk to people who want to work for the employer or who want to purchase things from it. In effect they seek to persuade others by communicating with them or pressuring them in some way. In 1899, the English Court of Appeal handed down its decision in a case called *Lyons & Sons* v. *Wilkins*. Unionized workers had given their employer notice that they were quitting their jobs and, then, in order to win a dispute they had with that employer, picketed his works. They carried placards and tried to persuade other people from going into the employer's premises. They did all this while the 1875 *Conspiracy and Protection of Property Act* was in effect. That statute had given combinations protection against criminal prosecutions when combining to get better terms and conditions. But one section provided that it was still a crime to watch and beset another person's house or place of work to compel that other person, "wrongfully and without legal authority," to refrain from doing what that person had a legal right to do. The Court of Appeal held that it was always wrongful to watch and beset, unless the conduct amounted to mere communication of information. Here there was more than mere communication of information and therefore the crime had been committed. This enabled a trial court to issue an injunction to prevent continuation of a crime.

As was so often the case in these capital-labour dispute cases, the reading of the law was tortuous, if not downright dishonest. By saying that watching and besetting was always wrongful, the court robbed the statute's phrase that it should be done wrongfully and without legal authority of any meaning. The potential adverse impact on unions was palpable. Unsurprisingly, the decision had to be revisited and revised as, once again, the judges' tendency to be cavalier about workers' rights had become too easy to see.

In 1906, in a case entitled *Ward, Lock and Co. Ltd.* v. *Operative Printers' Assistants' Association*, the same Court of Appeal held that there had to be a separate unlawful act ere conduct amounting to watching and besetting could become actionable. In short, a separate ground of civil liability had to be established. This should have eased the pain, but, of course, it turns out that unlawful acts are easily found to exist when pickets are erected. Inducements of breach of contract, conspiracies to do harm (a live tort at the time because of the decision in the *Quinn* case), engaging in

a private or public nuisance, defamation when communicating information, obstruction of access to members of the public, and the like were, and remain, foundations on which willing judges can base a finding of liability for wrongful picketing.

Let us take stock. As capitalist relations of production exploded during the 19th century, the English judiciary carved out an anti-working-class position.

As A.V. Dicey, the great chronicler of English legal developments, wrote:

> The best and the wisest of the judges who administered the law of England during the fifty years which followed 1825 were thoroughly imbued with Benthamite liberalism. They believed that the attempt of trade unions to raise the rate of wages was something like an attempt to oppose the law of nature.[2]

The working class had to fight valiantly to get some legislative relief from a legal system grounded in the common law's founding beliefs. They made some not inconsiderable gains. The judges, however, never gave up on what they saw as the law of nature. They imaginatively used their tools and prestige to hinder the promotion of worker collectivism and to advance the right of capitalists to trade, to remain unfettered by law as they ceaselessly sought to maximize profits. By 1906, they had seemingly restored the order they deemed natural. The fix was in. Once again workers had to fight back. Two avenues of resistance were carved out.

## CORRELATIONS BETWEEN COLLECTIVE BARGAINING TYPOLOGIES AND COMMON LAW?

When, in the *Taff Vale* case, the House of Lords diluted the hard-won rights of trade unions to act muscularly on behalf of their members by making trade unions responsible as entities should they get it legally wrong, unions and their members were spurred into political action. It is estimated that the number of trade unions establishing close relations with the new Labour Party trebled. The judiciary plowed on, seemingly ignorant of, or more likely, indifferent to, the hornet's nest they had poked. In quick succession, they refused the protection they had given to for-profit combinations to

trade unions; they made picketing, legally speaking, extremely awkward; and they gave the civil action crafted in *Lumley* v. *Gye* more bite. Unions and their new political allies were in uproar, enough to force the government to establish yet another Royal Commission of Inquiry in order to put a lid on the delegitimating pressures. The result was the enactment of the *Trade Disputes Act, 1906*. The Act defined trade disputes and then provided protection of people engaged in such trade disputes by inhibiting the application of the judges' rulings on picketing, civil conspiracy, and inducement of breach of contract. Importantly, it also provided that unions were to be immune from civil actions in tort cases brought under any of these rubrics. In short, legislative relief from the common law's intransigence when confronted by the exercise of combined worker power was the first, and initially successful, response mounted by English workers. It is to be noted that these legislative remedies did not become available in most of the other jurisdictions which had accepted the anti-union case law crafted in the English courts.

The second way out of the repressive framework was to look for a dispute resolution mechanism which kept the courts as far away as possible. This speaks strongly to the credibility of the theme of this chapter: the common law, as set out and applied by the judiciary, has a major impact on the way in which capital-labour relationships are governed and on the outcomes of their conflicts. Here I want to return to some of the discussion to be found in chapter three.

It was seen that, after the grievous losses suffered by Australian workers in the late 19th century, they used the constitutional debates that arose at the end of this period to embed a system that would not leave them as vulnerable as they had proven to be. The employers' successes were attributed in large part to their ability to marshal the common law's principles and rules, allowing them to leverage governments into using legalized sanctions against striking workers. At the same time, employers had been aided in their strike-breaking strategies by importing cheap labour from Polynesian islands. The ensuing "White Australia Policy" and the compulsory arbitration scheme, borrowed from New Zealand, were crafted. The racially based protections are not the focus here, except to note that the creation of any system of capital-labour relations is the product of a multiplicity of factors, in this instance race being a major factor. The

contribution of the nature of the prevailing legal system is one, a very important one, but not the only reason for the development of a particular mechanism of adjustment of capital-labour relations conflicts. This is a caution to be kept in mind lest the presentation favoured in this chapter leaves the impression that the legal origin theory is being given too much weight.

While, in principle, the Australian compulsory arbitration scheme made it illogical to give workers a right to strike, as unresolved employer-employee disputes were to be ended by the imposition of terms and conditions by a third party, this did not, in the end, signify that collectivism was inhibited by the system. To the contrary, over time, to render the compulsory arbitration systems operational, unions in New Zealand and Australia became central to the workings of the machinery. They would serve demands on all the employers in an industrial sector, whether unionized or not. It was known as the lodging of a log of claims. Any differences not resolved by the parties themselves—and many were—were to be settled by the state-appointed tribunal. The ensuing awards (as the outcomes came to be called) would be enforceable in the designated sector which they covered. Over time, compulsory arbitration came to have a highly centralizing impact. It was associated with a steady increase in union density. Unions became compulsory arbitration's pivotal institution. Most important to the focus of this chapter, if strikes took place, it became the practice to treat them, in the first place, as violations of the compulsory arbitration system and to be dealt with by that system's arbitrators, not by courts. There was no pressing need to invoke the dormant powers of the judiciary, although it was technically possible to do so.

In England, workers also sought for ways to skirt the law as crafted by the judges. Surprisingly—given the long recital above of the many 19th-century statutes which punished people for acting in concerted ways—there had been some narrowly focused worker-friendly bits of legislation. They had come after some fierce, manifestly illegal strikes on the docks in 1889 had brought the reigning scheme of repression into disrepute. This had forced the government of the day to deflect the political problems by appointing—what else?—a commission of inquiry. The *Royal Commission on Labour 1891–1894* issued five reports. They resulted in a common rate of pay for dockworkers as a means to overcome the conflicts caused by the

fact that workers were forced to bargain with a multiplicity of firms in the industry. After the anti-worker decisions leading up to the inhibition of collectivism and the forced 1906 legislative responses, these old reports and docklands' arrangements were resurrected and served as platforms for recommendations by the Whitley Committee, a committee struck during World War I. Note that its recommendations were proffered at a time during which the minimization of capital-labour conflict and interrupted production was a major concern. The Whitley Committee opted for industry-wide bargaining. It recommended that the government should look toward existing associations of employers and workers to form Joint Industrial Councils in identifiable industrial and occupational sectors. These Joint Industrial Councils were to negotiate terms and conditions of employment in their sectors. For unorganized workers in economically weak sectors, the already existing system to have representative boards set minimum conditions was to be enhanced.

This recommended scheme evolved into a voluntary system inasmuch as government facilitated its implementation but left it to the parties to set up their sectoral schemes. The schemes tolerated the use of economic force by employers and workers provided it was the result of centralized decision-making by employer and worker associations. It remained possible to have recourse to the judiciary to hold people responsible under the common law doctrines it had developed, but few saw the need to do it. It is to be noted that, as the economy came under pressure from the early 1920s on, the system faltered. When it first settled down, there were 73 Joint Industrial Councils; by 1926 this number had declined to 47 and by 1939 to 20. But by then, governments were pushing to re-establish the scheme, and by 1960, the number of Joint Industrial Councils had risen to 200. This centralizing policy was a feature of English capital-labour relations. Together with the Wages Boards (the tribunals dealing with the economically weak), 85 percent of English workers were covered by collective regimes rather than having to rely on their individual or firm-based strength.

In New Zealand and Australia, the role of the common law had been put on a back burner by direct legislative interventions. In England, the same result was obtained by insisting on a transcending non-legislative regime facilitated by governments. Both approaches were largely motivated by the

need to marginalize the common law, whose anti-worker starting points just did not fit with modern social, political, and economic expectations. At this stage, then, these three jurisdictions would have been classified by today's OECD as centralized coordinated collective bargaining regimes, systems in which competition between workers is reduced more than it is by other mechanisms of adjustment.

This was not true of the US or Canada. There collectivism was shunned and seriously restricted. There were odd exceptions, such as Canada's *Industrial Disputes Investigation Act in Canada* (1907), which allowed strikes but only after a long delay and a consideration by a Board of Conciliation which could recommend the terms and conditions to resolve the dispute. While these recommendations could be disregarded, the long wait and the restricted scope of the spheres to which the statute applied (mining, public service utility, transportation, and communication) left the right to effectively collectivize and strike in Canada a very limited one. Overall, the courts still set the boundaries. As the Depression of the late 1920s hit, and policy-makers were faced with an impoverished working class, possible political upheaval, and a crisis for capital as demand dropped alarmingly, the seeds for what was to become the Wagner Act model were being sown. As part of that development, as noted in chapter three, the federal government in the US enacted the Norris–La Guardia Act, aimed at liberating trade unions from repressive common law actions. By 1944, Saskatchewan, British Columbia, and Ontario had passed very weak and pale imitations of anti-common-law provisions of the 1906 English kind. As also noted in chapter three, after the end of World War II, US legislators quickly began to roll back some of the concessions made to workers, including a repeal of the Norris–La Guardia Act, which had safeguarded unions from potential civil litigation, and the enactment of the Taft-Hartley Act, which gave industrial disputants the right to go to the judiciary for relief. And it did not take long before the administrative tribunals overseeing the application of the various Wagner Act statutes in these jurisdictions emphasized that the basic model of bargaining was to be firm-by-firm bargaining. Unions were certified one workplace at a time. This is why so many unions have the label "local" attached to their name. Unions were given the right to strike, but only after going through a whole series of time-consuming and costly processes, and they were made responsible for

impatient and irresponsible workers who wanted to exercise their collective power regardless of whether the “proper” processes had been met by their certified union or whether their union agreed with them. Workers and their unions would then be subjected not only to the sanctions prescribed by the collective bargaining legislation but also to the rigours and pains of the common law as they induced breaches of contract, conspired in some illegal way, picketed in an unacceptable manner, and so on.

From the beginning, the US and Canadian schemes have been heavily influenced by the structural and ideological metes and bounds initially designed by common law judges, and they remain on the lowest rung of the OECD’s ladder of collective bargaining models. Their unions have never played the role which their counterparts in New Zealand, Australia, and the UK did. There they were an integral component of the regulatory institutions, participating with employers and governments in setting conditions in workplaces and being treated as legitimate partners in the development of the social wage. The way in which capital-labour relations were regulated had accorded not only a meaningful economic, but also a social and political, role, to trade unions, to collectivized workers. In North American jurisdictions, this had not happened because the collective bargaining model adopted assigned unions the role of being bargaining agents for workers at specified workplaces. While they did, and do, play a role in social and political affairs, they cannot do so easily because they have no institutional standing to do so. As a result, their position is markedly different and more attenuated. It is a sign of the times that, rather than the North American working class’s position approximating that of the better-placed New Zealand, Australian, and UK workers, the opposite is occurring. New Zealand, Australia, and the UK have fallen into that bottom tier of OECD collective bargaining models. The common law has contributed to this dramatic turnabout.

In chapter three, the intensified militance of the working class as World War II ended was recorded. While overall accommodations were reached with workers and the social wage improved, giving rise to what has been called a Golden Period of capitalism (or Les Trente Glorieuses), and while, as a class, employers should have been content, the invigorated power of workers always made many employers anxious. When they thought things were getting out of hand, such individual employers—despite the overall

tolerance for some worker collectivism—turned to their old friend: the judiciary.

This was especially true in the UK. Employers had not gone to the courts very much during the long period when they were happy to live with the voluntary arrangements they had with trade unions in industrial sectors, particularly when, after the defeat of the coal miners' strike in 1926, the Baldwin Conservative government had enacted legislation which made much of the conduct that frequently accompanies strikes criminal, just as it had been for much of the 19th century. Between 1927 and the commencement of the war, unions were enfeebled and employers were pleased to negotiate via the Joint Industrial Council arrangements. They had little to fear from hamstrung unions, which had suffered a great defeat, and they enjoyed the fruits of the centralized collective bargaining regime. This voluntarism was put on hold at the beginning of World War II. Strikes were forbidden and disputes were settled by a conciliation and arbitration scheme. All this changed after the war.

The post–World War I non-government-ordered (but government-approved) voluntary centralized bargaining model was revived. The 1927 *Trade Disputes and Trade Union Act* was repealed, removing criminal sanctions from strike-related activities. The Trades Union Congress accepted responsibility to keep overall industrial peace, in return for which it came to be treated by one and all as a full participant, with employers and government, in the regulation of capital-labour relations. No sooner was this renewal of the old voluntary centralized system (which looked more like the version which prevailed prior to the Depression than the post-Depression one) nailed down, than it began to be challenged. That challenge was impelled by workers who felt more confident and militant than they had in other periods.

Increasingly workers engaged in concerted action not led by the unions which represented them in the centralized Joint Industrial Council settings. When they struck, the strikes were no longer "official" strikes, the ones tolerated to give efficacy to the voluntary centralized scheme. The new waves of localized, unofficial work actions, led by shop stewards, tore the carefully woven industrial tranquility blanket to shreds. Employers responded in two ways. Their intellectual cadres—as documented by Paul Smith—rose to the occasion by calling for a return to libertarian ideas and

ideals. The other weapon they used was the common law. They tapped the never-given-up belief system which has always infected the judiciary. The English judges were asked to find lacunae in the 1906 worker-protecting legislation and did so with zeal. One spectacular decision is used as an illustration.

The case of *Rookes* v. *Barnard* arose out of a dispute in the airline industry. The employers and employees in that industry were covered by a national agreement which, among other things, stipulated that any dispute between firms and their employees should be submitted to arbitration. There was a "no strike" clause, which was taken to be part and parcel of the contracts of employment between British Overseas Airways Corporation and its workers. The unionized workers in a design office had a long-running dispute with their employer about the state of the office. Their failure to get satisfaction led one employee, the plaintiff Rookes, to urge strike action, in effect pushing for a breach of contract. His fellow workers and the union rejected his proposal. Rookes resigned from the union but not from his position as a working member in the design office. As a result, there was no longer a closed shop in the design office, an arrangement to which BOAC had agreed with the union and which entailed material benefits for the union. The shop stewards of the union supported a demand made by its officials (one of whom was not an employee). The employer was asked to remove Rookes from the design office, leaving only union members there. BOAC eventually did more than that: it dismissed Rookes from its employ. Rookes brought an action for damages against three named union officials and the union. The union and unionists did not dispute the facts. They simply argued that, as a matter of established law, they could not be held civilly liable. They made two separate points.

First, they contended that the 1906 *Trade Disputes Act* had immunized trade unions from civil liability for inducing breaches of contracts and civil conspiracy during a trade dispute. Second, they argued that Rookes was claiming that the defendants owed him a duty but that he could not point to any identifiable legal cause of action which gave rise to that duty. They lost both arguments.

The House of Lords held that the dispute was one that principally concerned union matters and was not a trade dispute for the purposes of the 1906 Act and, hence, the defendants could not rely on the protections it

offered unions and unionists. It is noted here, without further elaboration, that during this judicial revival period, this reading down of the scope of the 1906 Act was a tool often used by courts. It gave them room to reactivate and play their pre-1906 anti-collectivist role. They did so with gusto.

Having excised the dispute from the legislative protections, the House of Lords then had to confront the defendants' claim that they had not committed any wrong known to law. After all, there had been no breach of contract induced by their action, and their combination was entered into with a view to pursue their legitimate interest: at that time, an agreement guaranteeing a closed shop was perfectly legal and its protection clearly in the union's interest. Undeterred, the judges found that the unionists and their union had acted unlawfully. Their logic was revealing about how common law judges see workers' collectivism.

The unlawful conduct identified was the *threat* of inducing breaches of contract (as BOAC was told by the defendants that they might strike, and a strike would be a violation of a contractual term). This threat amounted to intimidation, a legal wrong which gives rise to civil liability. In short, they held that there is a *tort* of intimidation. Even though the House of Lords was sanguine about this pronouncement, it was not able to find much by way of precedent. There were a couple of long-forgotten 18th-century cases to a similar effect, and two obscure Irish holdings which supported their conclusion, but little else. There was, however, old *criminal* legislation. In 1824 (and again in 1859), it had been provided that "if any Person by Violence to the Person or Property, by Threats or Intimidation" shall wilfully interfere with employment rights of others, a crime would have been committed. Just as the court had reached out to a 500-year-old statute in *Lumley* v. *Gye* in 1853, the House of Lords, in 1964, looked back to a 140-year-old criminal piece of legislation. And, just as had been done in *Lumley* v.*Gye*, the judges nonchalantly transliterated conduct which originally was seen as criminal into behaviour that warranted the imposition of civil liability. To do this, the threat to breach a contract had to be analogized to stigmatizable conduct, to profoundly anti-social conduct. The judiciary's conviction that the exercise of economic power by workers was "unnatural," as requiring tight restraints, was in plain view—again. Several of the judges explicitly saw a breach of contract as the equivalent of an act of physical violence, as unalloyed intimidation.

In the end, the House of Lords had provided a brand-new weapon to employers. By reading a breach of contract (and, therefore, a threat to do so) as an unlawful act, they had driven a cart and horse through the legislation which protected English workers. Now a breach of contract had been added to the list of behaviours which made otherwise protected conduct actionable. Breaches of contract are inevitable in a system of private agreement-making which expects the parties to use their economic wherewithal, as the voluntary UK system did. To underscore that the House of Lords was intent on crafting a dagger to stab into the heart of existing English collective bargaining practices, note that their holding allowed the successful plaintiff, Rookes, to sue on the basis of a contract to which he was not a party. The privity of contract doctrine (tightly held onto by courts to deny workers statutory benefits, as will be documented in chapters six and seven) was loosened to a considerable extent. I have already drawn attention to another version of this sidestepping of precious privity of contract rules. In *Lumley* v. *Gye* the successful plaintiff's contract was given more protection than the contract law already gave him. In addition to an action for breach of contract against the other party to the contract, the opera singer, a third party was held responsible for that breach of contract. While the two cases—*Lumley* and *Rookes*—are different in important respects, the judicial technique is the same; the intent is the same and the desired outcome is the same: workers are to be legally handicapped as they face the owners of the means of production.

A storm of protest followed *Rookes* v. *Barnard*. The first response was the enactment of legislation that attempted to limit the scope of what was said to be the old tort of intimidation by the judges but was called a new tort of intimidation by everyone else. And, as usual when delegitimization of the system is a potential outcome of judicial decision-making, a new commission of inquiry was established. It, the Donovan Commission (discussed in part in chapter three), was given the task to deal with both the shop-steward-led local ("unofficial") strike wave and with the ensuing renewed judicial flexing of muscles. The commission determined that it should accept the facts on the ground. Specifically, it acknowledged that localized bargaining, stewards-led action, as opposed to national-union-led bargaining, had become the default position. There was a need to regularize the new status quo. Taking its cue from industrial pluralist thinking—which

also prevailed in the US and Canada with their Wagner model regimes—the Donovan Commission wrote in support of the need to recognize and to control the unions' role as workplace-level deal-makers. They were to be given standing as agents, and their right to raise dues, to bargain, and to take concerted economic action were to be respected. They were to be subjected to some monitoring, and a series of processes had to be gone through when workers and their unions exercised these local bargaining rights and privileges. If they did, they would be safe from the law.

This was hailed as a progressive report because it gave legitimacy to some collectivism and accorded respect to workers' choices. But it also put paid to what had been a centralized coordinated collective bargaining regime. While national unions and the umbrella-like Trades Union Congress still had roles as the public face of workers, they were no longer to function as direct participants in a national entente by dint of which overall agreements covering a whole segment of industry were struck with employer associations. The action was now principally to take place at isolated workplaces. In functional terms, unions had become, as the US and Canadian unions already were, agents for workers in specific firms. The Donovan Commission laid the ground for a sea change in the regulation of the UK's capital-labour resolution machinery. This prompted John Hendy, QC, a specialist in labour law, and Keith Ewing, professor of public law at King's College, to observe that, while the Donovan Commission's report rejected knee-jerk controls on trade unions called for by many voices on the right angered by obstreperous unofficial strikers, in the end, its recommendations turned out to have disastrous impacts on British trade unions and collective bargaining. The supposedly progressive acceptance of decentralized collective bargaining, Hendy and Ewing write, was not impelled by neo-liberal ideas. Still, the recommendations coincided with the proliferation of those ideas (aided not a little by the success of the Thatcher attacks, reaching their zenith with the defeat of the coal miners, as related in chapter three) and an increasingly right-wing press which was encouraged by the prestigious judicial pronouncements which vilified workers' collectivism. The contribution played by law is evident here.

All this moved the UK, in a relatively short time, from occupying a niche in the top ranks of the OECD's typologies of collective bargaining into its bottom category of enfeebled collective bargaining regimes.

Interestingly, as fractured, decentralized bargaining became ever more firmly installed and collective actions became more and more constrained by procedural requirements, it had become less useful in the UK for employers to reach out to the common law. The many decisions adverse to the exercise of workers' collectivized economic muscle had led to legislative remedies, and now that the overall post-Donovan system had done much to tame unions' and workers' powers, the common law could be left to hibernate in the UK.

This was not the case in other common law polities. There the respect for the UK judiciary meant that its decisions were made part of the law of the land. But they were not blunted by remedial legislation, as they had been in the UK. The innovations by British courts, in the 1950s and 1960s in particular, provided new anti-worker jurisprudence to the former colonies. In addition to the acceptance of the existence of the tort of intimidation—which made it so easy to find the commission of an unlawful act, rendering the torts of inducing a breach of contract and civil conspiracy more effective—the courts in the old colonies accepted as valid common law English decisions which had dropped the original requirement that it was necessary to make out a case that an actual contractual term had been breached before the tort in *Lumley* v. *Gye* could be established. English courts had held that an interference with contractual relations, that is, an interference with hoped-for business, would suffice. More, there need not be an actual breach of a term of a contract: simply hindering performance of a contract would suffice; the interference might be indirect, although, then, a separate unlawful act had to be proved to have been committed, something made easier by the existence of the new tort of intimidation and, in countries like Canada, New Zealand, and Australia, by the fact that their regimes were based on statutory laws whose violations would provide the basis for a separate unlawful act. And while initially it was thought that the defendant had to know that there was a contract which its conduct would violate, it was now enough if the defendant should have known that it was likely that such a contract existed; it was not essential for the defendant to have known what the specific terms of the contract might be.

The common law, as enunciated by the British courts, had made it easier and easier to hold workers to account. In the absence of statutorily drafted remedies against the expansions of the bases for liability of the kind enacted

in the UK, employers in the former colonies were given a whole new suite of weapons. They were encouraged to use them, as capital everywhere began its assault on the post–World War II gains made by the working class. As recounted in the previous chapter, think tanks began to boost the ideology of private contract and individualism. Going to a more heavily armed judiciary which was known to be ready and willing to endorse this ideology was a natural strategy to follow. And, as chapter three documented, Australian lawyers reached out successfully to the newly repressive judicial statements of the law. This boosted the standing of the right-wing think tanks. A new framework for thinking about capital-labour relations dispute resolution was emerging. Politicians and policy-makers found themselves in a cultural, social, and political milieu which fitted much better with neo-liberal ideas and ideals based on private property and private contract than with the collectivist social notions which had underpinned the compulsory arbitration systems, with their emphasis of taking terms and conditions out of competition as much as possible. As global trading, new technologies, and changing political alliances and competing blocs were exerting pressures for large-scale transformations, the combination of law and the dissemination of right-wing intellectual libertarian ideology contributed greatly to the smashing of the old systems.

In New Zealand, as noted in chapter three, Rogernomics led to the collapse of its compulsory arbitration system, virtually eliminating unions and collective bargaining. In Australia, the descent into individualism was astonishingly steep and fast. At one stage, federal labour relations were based on a statute that explicitly provided that bargaining between individuals lay at the heart of capital-labour resolution. This was ameliorated somewhat by later enactments, but the direction in which countries like New Zealand and Australia were being pushed, with the willing aid of common law functionaries, was unquestionable. They, like the UK, moved from being in the top rank of centralized coordinated collective bargaining regimes into the lowest of the OECD’s types of collective bargaining. They joined the US and Canada, where the height of achievement from a workers’ point of view had been the winning of the Wagner Act model of bargaining which presupposed that firm-by-firm bargaining was the best workers could do. Not only do unions fall victims to the statutory schemes’ constraints if they seek to act as representatives of

the working class, rather than as tightly controlled agents of an administratively certified bargaining unit at one firm, but they will also be subject to the common law restrictions discussed at such great length in this chapter.

The common law has not been a friend to the working class.

## SUMMATION

1. Currently, it is clear that the employing class is much closer to attaining its goal than is the working class. In the last five decades or so, there has been a steady movement which favours individual and/or firm-based collective bargaining over other possible mechanisms of adjustment. Workers are seeing their ultimate goal, the abolition of work for wages in a competitive political economy, recede further and further into the distance.
2. The argument has not been that this is primarily due to the fact that the jurisdictions under review—the US, the UK, Canada, Australia, and New Zealand—share a devotion to the common law. Other factors play a major part. Evidence is to be found in this chapter which recorded that, for many years, at least New Zealand, Australia, and the UK were able to develop capital-labour regulatory schemes which marginalized the common law's doctrines.
3. This does not gainsay the contention that the common law plays a significant role in the moulding and maintenance of capital-labour relations dispute systems. The courts use their independence and the elasticity of their decision-making methods to impose restrictions on conduct which they deem to be contrary to the holiness (a) of the right of private property owners to deploy their assets as they choose, (b) of the sacredness of assumption that employers and workers are equally sovereign in law and should be allowed to agree to terms and conditions unhindered by outsiders, and (c) that social relations posited on individualism make for greater liberty than do those based on collectivism. Often their decisions which privilege employers over workers are derisorily dismissed as evidence of crass bias. A better way to view them, however, is to see them as the logical outcome of the way the common law judiciary sees its historic role.

4. It is this stoutly maintained notion of the judiciary's role as an independent institution, one above the fray of political fights for momentary advantage, one based on principles rather than irrational exercises of power, which gives the judges' pronouncements a standing which other decision-makers find hard to emulate. Their world view coincides with what neo-liberalism needs, and whenever capitalists agitate for reduced union and collective bargaining rights, they can rely not only on getting useful decisions from the courts, but also on media and politicians who internalize the judiciary's declarations (made from on high) as to what kind of society we ought to aspire to. It certainly is not a society which prefers collective decision-making, promotes substantial equality requiring redistribution of the wealth of the nation, and prefers modes of production which would treat the actual producers as primary decision-makers. The common law has built a huge eight ball and it has put workers behind it.
5. This situation does not stop workers from fighting back. As this work is being written, there are major national strikes in public sectors in the UK, specifically in the railways and health care sectors. They are not confined to firm-by-firm struggles, and it is notable that the unions' leaders are asking not just for better work conditions but also for major social and political changes. These activists and agitators are defying the limits on workers' and unions' assigned roles. In both Australia and New Zealand, labour-friendly governments have introduced legislation to permit multi-employer bargaining, after previous governments had prohibited this. It is a clear attempt to allow workers to regain some of the losses they suffered when they were relegated to firm-by-firm bargaining (and before that to bargaining as individuals). Realistically, as multi-employer bargaining can only be made operational by having unions organize it, there is a quiet hope that this will increase union membership, which had sunk to abysmal lows. There is, then, an attempt to elevate Australia and New Zealand to the level of OECD collective bargaining regimes just above the lowest tier which they currently occupy. In the US, too, where the incidence of collective bargaining has plunged, workers are struggling to get more collective bargaining rights. They have sought to have unions certified as bargaining agents at multi-franchised enterprises, such as

Amazon and Starbucks. Because they are caught in the frame of the plant-by-plant Wagner model, they are organizing one franchise at a time.

6. These brave efforts may well yield poor returns. It is early days for these and the other changes that are coming into view. What needs to be said is that they are evidence of an elemental truth: workers must fight, must find a way to pool their resources, to act in solidarity. If they do not, self-interested employers will push downward as hard as they can. And what workers should understand is that, while it is often easier to fight in court than on the streets and in the workplaces, and while they will win an occasional court case, history makes it plain: the common law will support the structures (property and contract) and the ideology (individualism) which capitalism needs to remain dominant. The common law has tailored itself to serve the dominant class.

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PART III

# *The Employment Contract*

Wherein the focus is on the idealized notions of contract. Law's emphasis is that a particular adaptation of these ideals, the contract of employment between legal equals, establishes the rights and obligations of capitalists and their workers. The holding out is that law merely provides an instrument to make an acceptable concept, a contract between autonomous individuals, work efficiently and justly. It falls to law, law-makers, and their institutions to decide whether a contract has been created which, then, determines the duties and obligations of the parties. This gives legal functionaries a determining role. Law's methodology furnishes them with the discretion to categorize relationships. But as law has its own need to be legitimate—which, in turn, endorses the legitimacy of capitalist relations of production which it favours—it creates instruments that render contracts of employment less coercive than they otherwise might be and still often are. Law becomes a terrain of contest as workers push for better outcomes and capital insists that its agenda can only be fulfilled if law protects the basic structures, namely the rights that accompany private property ownership, freedom of contract, and the maintenance of the individual as the key actor of the prevailing system of social relations. Lack of clarity is guaranteed as these tensions are addressed. Employers use this unclarity to avoid the impact of contracts which incorporate some of the victories won by workers. As well, the employing class relies on a fundamental principle supported by law, the freedom of workers to sell their capacities. This allows capitalists (as by definition they avoid being employers) to skirt the formalities of contracts altogether. Workers find themselves fighting for the reification of work-for-wages contracts, which is what imprisoned them in the first place.

CHAPTER 5

# *How judges are programmed to define and interpret contracts of employment*

The drive to maximize profits is capitalism's life force. Keeping down the costs of production is a ceaseless quest. Integral to that is the diminution, to a vanishing point if possible, of the price employers need to pay to purchase labour power. Just as important to them is the need to minimize the costs incurred in getting the most value possible out of each unit of labour power purchased. Those primordial drives are not deeply hidden. We are continuously reminded that, if they could have their druthers, our capitalists would still be exploiting child labour, provide no health and safety precautions, offer no replacement income when workers are injured or let go, would not want to be held responsible for workers' welfare when they become too old or sick to sell their labour power, would much prefer not to have to abide by any limitations on the hours of work they can demand from workers, and so on, and so on. We know this because of what they do. Many of the more impoverished parts of the ever-more-integrated worldwide networks of capitalist relations of production attract investment capital. They do so because those poorer, less developed, locales do not put any meaningful checks on investors' drive to accumulate. Child labour is rampant; health and safety is disregarded; maiming and killing in the workplace is commonplace; attempts at unionization have to overcome repressive laws; police and the military are called out to help employers facing resistance; an upper limit to work hours, compensation for injuries, and income when unemployed or beyond working age are virtually unknown. Profit-seekers' havens.

In this context, the advances that have been made by workers in the countries focused on in this book are seen as precious, and workers will

want to protect them. Yet, significant as they are, the scope of these worker protections is not as great as is commonly believed, nor are they solidly embedded. They are limited by the are they solidly embedded. They are limited by the legal institutions and instruments used to give them life. They are not natural, not eternal, not inviolable. These gains constitute temporary and narrowly carved out relief from the hardships that would be imposed by the unfettered use of economic power by the owners of the means of production. Workers, in order to avail themselves of this confined relief, must bring themselves within the four corners of the legally created zones of protection. If they cannot, they will be thrown back into the same maw of an unmediated labour market where so many workers in the less economically developed sectors of the world find themselves.

The gains made by workers were attached to contracts of employment. This is still true today. When workers claim their entitlement to benefits under standard-setting legislative schemes, they must prove that they have entered into a legally recognized contract of employment with a specific firm. Workers, not having any assets but their labour power, will be better off if they can conclude a contract of employment because they will have a parcel of protecting standards included in that contract. This creates incentives for cynical manipulations engineered by lawyers and accountants, professionals who are willing to render a service which mirrors that delivered by fellow professionals for the rich who seek to avoid taxes.

A paradox comes into view. It is *workers* who now will insist that they have entered into an enforceable contract of employment. They are reifying what, not so long ago, many renounced as adverse to their interests.

That logic impels employers to take the opposite tack. Given that their potential to squeeze more out of workers is diminished by governments' interferences with the "natural" operation of labour markets, they continuously seek to reverse the impacts of these interferences. They want to restore what they and their intellectual allies claim to be the natural order of things.

The owners of the means of production have always remained in a position to claim that the entitlements won by workers—to bargain collectively and to force the employer to meet some minimum standards of employment—are unnatural. They interfere with the basic principles of the system (especially property owners' right to enjoy their property as they

choose), and it is perfectly right and just that the owners of the means of production should be allowed to purchase their labour power without such interventions. Owners follow through on this claim of inherent entitlement with zeal.

They do not always do so in a legal manner. Some employers, perhaps driven by their sense that the distortions of the market are unfair to them, simply cheat. *Broken Laws, Unprotected Workers*, a 2019 National Employment Law Project report, reported that 37 percent of undocumented workers in the US were victims of underpayment for work done, that is, were paid less than the minimum wage legislation required they be paid. This compared to 24 percent of documented immigrant workers and 16 percent of US-born workers who were similarly short-changed. The Economic Policy Institute recorded that, in 2017, 2.4 million workers in 10 states were owed $8 billion that year by scoff-law employers. Extrapolating this degree of underpayment to the national stage led the study to claim that unpaid wages in the US totalled $15 billion per annum and that this staggering sum did not include amounts owed for unpaid overtime worked. Manifestly, some members of the employing class are more than eager to exploit the vulnerability of workers. The peculiar weakness of undocumented and documented migrants and their resulting deprivations speak to this, loudly.

The same phenomenon is observed in Australia, where wage theft is so rife that two state governments, Victoria and Queensland, have created a new crime to deal with the situation. The pressure to do so came from some unions which see wage theft as a systemic problem, a business model. One study has calculated that one in five Australian workers are underpaid, to the tune of $1.8 billion a year, a very large number in Australian terms. As is to be expected, people holding visas which limit their work rights and immigrants are favourite targets for rapacious employers.

One of the possible reasons why so many employers engage in these plainly unlawful ways to reduce their labour costs is not only that so few workers are in a position to enforce the laws but also that enforcement of these kinds of minimum standard laws is notoriously poor. There are a number of built-in reasons for this, to which chapter eleven, on regulatory laws, will return. For the moment it suffices to note that, if there is an

opportunity to exploit workers, legally or illegally, many employers stand ready to do so.

To take these opportunities, however, employers need not stoop to illegality. They rely on the ideologically and legally unchallenged principle that their right to deploy their private property as they choose should be as untrammelled as possible. This allows them to argue that government interventions should be kept to a minimum. They get a great deal of help from ideologically friendly functionaries as they relentlessly pursue this anti-regulatory agenda. Both their lobbying and legal arguments have resonance with law-makers, judges, and administrators.

These legal functionaries are personnel who have internalized judicial teachings. That signifies that, like judges, they can best serve the system of prevailing social relations by treating interventions with property rights as unnatural incursions. In all sorts of spheres, these legal functionaries and practitioners are told, every day, by normal judicial practices and scholarly teachings, that it is right and proper to defend a status quo where the owners of the means of production deserve protection from all others.

Here are just a few examples of how this capitalist-favouring stage is set, how everything adjudicators know points them toward providing greater protection for the owners of the means of production than for those with nothing to invest but their bodies and minds.

## THE CORPORATION'S PERSONHOOD

The creation of the corporation-for-profit is justified because it leads to a more efficient use of property, the holy grail in capitalism. A number of property owners are given incentives to pool their resources because, when collectivized in this way, the bits of property invested are likely to be put to more effective use than they could be as smaller, atomized lots of capital. To this end, the created corporation is an envelope. It can hold all the contributed properties, as one single lot, owned by it. To enable this, it is given legal personhood, that is, it becomes a person with the same legal capacities any human being has. It can buy and sell; it can be a market actor; it can be a capitalist. The corporation is treated as a person separate from all other persons in the world, separate from the investors (shareholders), from those who lend it money (creditors), from those appointed to design its profit-chasing agenda (its directors, appointed by the

shareholders), separate from the hands-on executives (chosen by the appointed directors), separate from any other corporations the corporation as a legal person can create (subsidiaries who, in turn, can create separate persons, producing a family or group of corporations), and, of course, separate from the workers who carry out the tasks that are intended to yield profits. The beneficiaries are to be the shareholders, the investors who gave up some of their property to set this machinery in motion. They are promised a share of any profits made by the corporation as it deploys the property it now owns and controls. Their share of the profits/dividends distributed by the corporation reflects the size of their contribution to the corporation's capital. They are incentivized to give up some of their property to a corporation, not only by having the right to vote for directors whom they can thus control and push to maximize the profits in which the shareholders will share, but also by having much of the risk associated with investing taken out of play. They have limited financial responsibility. If the corporation incurs debts or obligations, the shareholders may lose their investment, but no more than that. Shareholders are not on the hook to make up any losses the corporation incurred as it chased profits on their behalf. And because the corporation is a separate legal person, it, not the shareholders, will be held responsible for any violations of regulatory or criminal laws that may have taken place as it pursued profits for those shareholders. In addition to these incentives to get them to transfer some of their property to an incorporated firm, shareholders are treated as if they belong to a peculiarly vulnerable class that is in dire need of statutory protections. There are a host of public institutions and laws to ensure that corporations put out accurate information to all those who have invested or who might invest in them. Access to such vital information must be made available to all of those who contribute or might contribute capital so that no unfair advantage is obtained by some capitalists and not by others. This kind of government intervention is much appreciated by the property-owning class. These investor-friendly interventions offer far better and better-enforced protections than any worker protections do.

All these legally bestowed generous benefits create an environment of which judges and administrative tribunals are fully conscious. It is an environment which uses refined legally created doctrines and institutions designed to protect private property owners and their drive to accumulate

wealth. The message is hard to miss, especially by legal functionaries, most of whom have spent a lifetime serving corporations. This slants their views when pronouncing on the validity of a scheme by employers seeking to avoid the cost of a worker-favouring limitation on property rights. They sense that law is, and expects them to be, on the side of the owners of the means of production.

### WORKERS' INTERESTS?

Workers have none of the legal rights that investors have when the corporation makes a decision which affects their lives. Say a corporate decision is made to sell a substantial part of its assets, or to pay a special dividend rather than invest in more production, or to give executives a bonus at the same time as it declares redundancies—all garden-variety corporate decisions. There is nothing *in* law which gives workers a say in that kind of corporate decision-making. They must wrest any participatory role they would like to play from the corporation and its directors and shareholders by exercising such private bargaining clout as they can muster. Investors, of course, not only have legal control over the directors—and thus executives—but also have a right to say no if they do not like a decision, such as a sale of a substantial part of the corporation's assets or a declaration by it of a bonus for executives, or a transaction which might lead to a merger or takeover with deep implications for the way the business is to be run. The shareholders' rights to have a voice are *legally* endorsed rights. Investors of capital do not have to fight for them.

#### HOW LAW'S FUNCTIONARIES SEE THE WORLD

A tightly integrated group of companies ran a stevedoring business in Australia. The directors and executives had restructured the corporate group to enable them to get rid of unionized workers. As part of the ensuing litigation (after a massive strike), the union made a legal argument that the corporate directors and executives of the group owed the workers a duty to look after their welfare. After all the workers had made major contributions to the corporations' welfare. The High Court of Australia rejected this argument, noting that the executives owed their duty to the corporations, to the administration of these corporations' property, and to the furthering of the interests of the corporations' legal members. Workers were not legal members. The Court went on to say that, should these legal outsiders, these workers, be able to show that the corporation had borrowed monies from them, they would

be owed a duty of care by the directors. As lenders they would be akin to investors. As such they would become more worthy of protection than they were as workers.

Lines between capitalists and workers are maintained by built-in legal bias, not by logic, a bias which infects the judiciary and administrative tribunals.

Judges and administrative tribunals are told, again and again, that capitalists' interests are worthy of protections. Everything around them, everything they know about law, tells them that it is unremarkable, nay, commendable, for employers to fend off regulations merely to help workers out by imposing costs on property owners.

### SECURITY INTERESTS

For investors in corporations to bring an action under the government-spawned regulatory protections they have been granted, they must show they have a special kind of interest that needs protection, much as workers have to demonstrate that they had been working under a contract of employment when they claim a legislated benefit. What investors must show is that they had a "security interest." A "security" is created when one person invests money in a common enterprise and is led to expect profits *solely from the efforts of the promoter or third parties*.

Legal functionaries are being told, explicitly, that the expropriation of value generated by *others*' efforts are worthy of protection by law. They are told that the investment of property to get more property permits the taking of value produced by non-property owners, a remarkable deviation from the idea that everyone should be entitled to the product of their own labour.

### PARTNERSHIPS

One way of conducting a business is by the formation of a partnership. Every one of the jurisdictions under discussion here has enacted a statute that codifies the principles of partnership law developed by common law judges. These statutes define a partnership as a firm in which two or more people carry on a business in common with a view to the making of a profit. On the face of it, this is the precise relationship between (a) investors of inorganic capital and (b) workers who have invested their labour power in a business. It looks as if they are in business to make profits together. Should the law, then, not hold that the workers are partners in this business? And if

they are partners, should they not have the same rights as the partners who invested capital rather than labour power? The statutory definition does not make this a crazy idea. Indeed, in popular discourse, investors often can be heard to proffer the sentiment that their workers are their "partners." It is true, of course, that all too often we hear this when the investors ask workers to make sacrifices during a down cycle or when there is a shortage of available labour. But that is just talk. Law and its judges and administrators are not swayed by common sense or mere logic. Having defined a partnership as they do, the partnership statutes go on to declare that, just because the remuneration paid for doing tasks on behalf of the profit-making activity takes the form of a share of the profits of the business, such a remunerated contributor is not necessarily a partner with all the responsibilities and rights which this implies. The "mere" fact that workers contribute to a firm's profit-making activity and that their pay is based on a share of the profits made will not automatically make them partners; they might still be a different species, namely workers. The vagueness of this legislative formulation and, therefore, the difficulty of its application, is evident.

Once again, the judges and administrative tribunals charged with determining whether or not a contract of employment exists are given a strong signal: it is appropriate and right to treat the investors of inorganic capital and investors of labour power differently. The signal that it is permissible to draw such a distinction is posited on an assumption about the nature of the relationship between these two classes of investors, albeit there is nothing in liberal thinking or liberal law which specifies that there are these two classes. A choice is made, somehow. Unspoken assumptions colour the decision-making. Unarticulated assumptions undergird the legal characterization of relationships.

## SERVANTS AND GENTLEMEN

The decision in *Lumley* v. *Gye* was discussed at some length in the previous chapter. One of the issues was whether Johanna Wagner, an opera singer in great demand, was a servant within the meaning of the 14th-century Black Plague statute. A servant was identified as a person of low economic status, as "every person of whatever condition, free or bond, able in body, and under the age of sixty, not living by merchandise nor having certain craft,

and having of his own wherewith to live, nor land of his own on the cultivation he may occupy himself, and not being in service." In holding that the highly respected and sovereign Johanna Wagner was a servant, the reasoning of the court revealed how judges saw (and see) the world. The clearest exposition is to be found in the judgment of the dissentient, Coleridge, J. He noted that any new principles being formulated to found civil liability could never be applied to cases in which the person persuaded to break a contract was a knight, an esquire, or a gentleman. To be sure, such persons could, as violators of their contracts, be sued for breach of contract, but the party who had persuaded them to so act could not be. Why was this so? They were not servants because they had incomes of their own. This was crucial: they did not have to engage in work for wages as servants/workers *must*. People without any wealth or income of their own could not survive unless they agreed to be servants/workers. Knights, esquires, and gentlemen were not being forced to work. The centrality of this distinction was illustrated by intriguing comparisons made between different kinds of chaplains. Those who were private chaplains and who did not have any specific services to perform were to be treated as the equivalents of knights, esquires, and gentlemen. Nothing compelled them to conduct services, indeed to do anything they did not choose to do. Parochial chaplains, however, had duties, such as being required to visit parishioners, to attend to the ill and stricken, and the like. They had to perform tasks to be paid; they had been forced to take on remunerative work. This made them more like labourers than like gentlemen.

While all this may seem a little quaint today, it does demonstrate that the law is always looking for the distinction between those who have capital and can make choices about what they do with it and those whose circumstances give them little option but to find someone to buy their labour power.

Law draws these distinctions because it is committed to give protections to those with material wherewithal. The safeguarding of property rights is law's default position. Law's functionaries understand that owners of the means of production (a term they never use, of course) are to be protected. They understand the opposite is true when it comes to workers' interests, that is, when it comes to those who do not own any of the means of production. Legislation may step in to force them to do so, but judges and

administrative tribunals do not sense that this means that they should be generous in their interpretation and enforcement of unnatural entitlements given by legislation.

This should suffice to establish the proposition that, when policy- and law-makers approach the question of rights and obligations that govern our capital-labour institutions, they come with ideas and notions that colour their thinking and decision-making. The illustrations were chosen to indicate that those internalized views are traceable to (oft-unacknowledged) opinions about status and class.

## SUMMATION

1. From the beginning, inequality and the peculiar nature of the bargain they were pressured to enter pushed would-be employees to change the starting positions when forced to engage in negotiations for a contract of employment. They sought to reduce competition among themselves and to make it unlawful to work for less than provided for by any legislative standards they wrung out of government. The privilege of unionization and entitlements to minimum standards became tied to the existence of a contract of employment.
2. Employers stand to gain if these worker protections can be avoided. Ever since the end of the exceptional period, the so-called Trente Glorieuses, they have shown themselves eager to do so. Capitalists are wedded not so much to the contract of employment as to the concept of a unique kind of freedom, one which allows workers to sell their labour power as if it were a piece of equipment. This signifies that capitalists may be able to extract more value from the labour power used by means other than entering into a legally enforceable contract of employment. It follows that, if they can do this and avoid the contract of employment with its legislated restrictions on profit maximization, they will do so. Just as workers set out to prove that the work they are performing is done under a legally recognized contract of employment, employers may want to show that it is not. The characterization of their legal relationship becomes a contested terrain.
3. Courts and administrative tribunals who oversee the laws produced by policy-makers and legislators are charged with settling those issues. These

bodies are informed by the precedents and ideology of law. The functionaries of the legal system are educated by a plethora of rules and decisions which show that law lives comfortably with differential treatment, that is, more favourable treatment for private property ownership than for the interests of workers.

4. Law, however, does purport to be neutral as between sovereign individuals. Thus, for the more favourable treatment of property owners to be legitimate, it is necessary that certain assumptions about status and class be ignored, that they remain unchallenged. This has become easier because modern capitalist modes of production have done away with some of the old certainties about class relations.
5. Marx envisaged two classes, a capitalist class which exercised effective control over the means of production and a class of wage-labourers. Many sociologists say that this easy-to-read divide is too simplistic. For instance, Erik Olin Wright argues that many people occupy contradictory positions. Thus, managers and supervisors may both be controllers of workers on behalf of capitalists and be themselves controlled. Over time, some of them may save some of the profits out of which they are paid. Their pay rates may be significant and may include a share of the surplus they help generate for the firm which they serve. This does not necessarily turn them into members of the capitalist class (although, as chapter ten will argue, it may), but it does tie them culturally, politically, and socially to the capitalist class. They might be described as personifications of capital as it exercises its dominium over labour. Similarly, those who run their own businesses may control those who work for them but also be controlled by controllers of capital on which their businesses rely. A muddled class picture is emerging. John Urry complicates it further by arguing that the large-sized profit-seeking firms that now dominate our economies employ a slew of professionals, technologists, and managers to maintain and produce human capital for the enterprises they serve. Barbara and John Ehrenreich identify the importance of what they call a “Professional-Managerial Class.” Its task, they say, is to reproduce capitalist culture and capitalist class relations. This cohort is constituted by teachers, social workers, psychologists, entertainers, and writers of advertising copy and television scripts (and one supposes, these days, certain kinds of social media publications).

Their argument is that capitalism needs this kind of cultural and ideological support. One result of this "education" is the intensification of non-work life goals, that is, causing workers to think about their lives outside the workplace as the most important site of living, more often than not as isolated consumers. It is tempting to think of this Professional-Managerial Class as not belonging to the working class, even though it does not exercise effective control over the means of production. Certainly, what its members do serves the capitalist class rather than the working class, making them a hurdle to be overcome by those who seek solidarity as they agitate to mount resistance to capitalism.

6. This very simplified sketch of the arguments about status and class is not meant to be definitive. It is offered to make a simple point. There is confusion about the nature of relationships between capital and those who serve its drive for profits. It is, somewhat irritatingly, illustrated by the recent Liberal government of Canada's announcement that it had created a new Cabinet post. There was to be a Minister of Middle Class Prosperity. It came in the wake of a political discourse and shallow media reporting about the disappearance of the middle class. The thrust of that discourse is to establish that, in mature capitalism, the idea of one class controlling the fate of another, of one class exploiting another, was passé but that, in recent times, rapacious capitalists, aided by new technologies and facilities, had revived these old-fashioned ideas. This had to stop. The establishment of the new ministry in Canada was a statement saying just that: we are not a society based on class conflict and we will arrest any regressive tendencies that might bring back the bad old days. It was trickery, of course. When asked what her task might be, the just-appointed minister for the prosperity of the middle class had no idea what her brief was. She fatuously said that she thought that a middle class family was one that could afford to have their two kids play hockey.
7. The confusion about status and class, combined with the internalized assumptions that infect legal functionaries, govern the way in which judges and administrative tribunals determine whether people are entitled to benefits attached to contracts of employment. Many employers, sensing the utility of this confusion, organize their for-profit activities in such a way that they may *appear* to decision-makers (who are eager to nail down the proposition that class-conflict arguments have no relevance) as being

arrangements between people of the same class or equivalent status. If they are not blighted by class conflict, the arrangements' terms and conditions should be left untouched by regulatory frameworks that treat workers as belonging to a vulnerable interest group or, even worse, as belonging to a different and dominated class. If the owners of the means of production manage to arrange their affairs so as to have needed work performed by seemingly autonomous enterprisers, by profit-seeking actors no different to themselves, the employing class will be able to extract surplus value without being bound by the much-restructured rules of contracts of employment.

8. An intensified legal terrain of struggle has emerged as workers want to conclude legally enforceable contracts of employment and employers would like to have the same work done without the legal strictures imposed by contract of employment laws. I turn next to the ins and outs of this struggle.

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CHAPTER 6

# *How employers avoid the employment contract's strictures and profit from its principles and ideology*

Workers' legal rights and duties depend on how (a) law treats the nature of a specific job and (b) how, when, where, and with whom or for whom workers are doing work.

## LOOKING FOR WALDO, ANY WALDO

**Scenario 1:** Brook Street Bureau was an English labour hire company. It entered into a contract with Mrs. Dacas. The contract specified that she was an independent contractor. Pursuant to that contract, she was sent by Brook Street Bureau to do cleaning work for a local authority. No express or formal contract was concluded between the local authority and Mrs. Dacas. The local authority did have a formal contractual arrangement with Brook Street Bureau. One of the conditions of this contract was that the local authority (referred to as the host) had the power to get rid of Mrs. Dacas by simply asking Brook Street Bureau to dismiss her. The host did so after Mrs. Dacas had worked for it for four years. Mrs. Dacas felt that, under the statutory laws governing the dismissal of employees, she had been unfairly dismissed. She brought an action against both the host and the labour hire company. She failed.

**Scenario 2:** A man called Tilson wanted to work for wages. He signed a contract with an outfit called Silversun Solutions Ltd. It agreed to help Tilson on the basis that any remuneration that became due to Tilson would be paid to him after Silversun had collected that remuneration and deducted a 3 percent fee. Silversun then entered into a contract with a labour hire firm named Morson Human Resources. This contract provided that

Silversun would make Tilson available to Morson. Morson was to place Tilson with one of its clients that needed workers. Morson entered into a contract with its client Alstom to send Tilson to it. Alstom was to be the host entity. In due course, Tilson was let go and brought an action for unfair dismissal against Alstom, an action available to employees. He failed.

In both cases, the workers failed because the rights they wanted to enforce only exist when a contract of employment exists.

## THE ISSUES THAT EMERGE

The use of tax havens and other such tools by the rich and their corporations is a source of vexation, a festering sore, for the general public. The public knows that these schemes violate the spirit of democratically enacted taxation laws but are repeatedly told that, as the scheming does not offend the letter of taxation laws, nothing should be done about the schemers who are plotting to avoid the taxes. This leads to frustration. People are constantly reminded that the wealthy are hell-bent on accumulating ever more wealth and will use all kinds of means to do so, even if that pursuit comes at the expense of the rest of society.

It should, then, be no surprise to anyone that the same rich and powerful will behave in the same way in the capital-labour relations legal sphere. This is what the sketches of the two scenarios above tell us. The same genre of cunning deployed by tax schemers was on display in those cases. In the end, what was done was plainly permitted by law and was, equally plainly, destructive of the spirit of democratically enacted laws designed to protect workers.

In both cases there were workers who needed a paid job and were willing to sell their labour power. In both cases there was an owner of assets who needed work performed. The workers and the firms could have negotiated the terms and conditions of a contract of work for wages directly. They would have concluded a personal contract of employment. Such a contract would have had incorporated into it legislative protections which the working class—after long and bitter struggles—had won. In our two cases, the worker would have liked to have a contract of employment. In our two cases, the hosts, that is, those who wanted work done for them, wanted to avoid the application of those cost-imposing worker protections.

They succeeded in engineering a series of contracts, none of which, looked at separately, was a personal contract of employment.

The host in both cases wanted what every *employer* wants. They wanted to be able to determine what work was to be done, when, where, and how. Their agreements with the labour hire firms gave them this power over the workers. They could also get rid of the workers by having the labour hire firms agree to accept a recommendation they might make to them to dismiss the workers. That is, the separate contracts—between the hosts and labour hire firms and between the labour hire firms and the workers—functioned as an integrated scheme to get the result a direct, personal employment contract would have yielded, even though no contract of employment between the hosts and the workers had ever been concluded.

How could the law permit this kind of avoidance of legally established worker-protection mechanisms? Part of the answer is that the manipulators were able to rely on legal methodology and orthodoxy. They relied on formalistic adherence to a fundamental principle of contract law and the ideology that goes with it.

## THE PRINCIPLE

The legal principle which anchors the law's approach to capitalist-worker relations is known as privity of contract. If sovereign individuals enter into a contract, only they are parties to it. The labour hire firms and hosts owed each other contractual obligations, and the labour hire firms and the workers owed each other different obligations. The hosts, having no contract with the workers, owed them no *contractual* obligations that could attract the application of laws that covered employment contracts. Functionally, effectively, the ways in which the contracts interacted left the workers indistinguishable from employees, as that status is envisaged by the laws governing contracts of employment. But *legally* the workers did not have the necessary formal relationship to the host, to the functional employer.

The combination of contracts *could* have been assessed to have created a situation that would not permit the hosts to avoid the incidence of employee-protecting laws. Adjudicators *could* have held that, even though the instruments used seemed to negate the establishment of a contract of employment, the actual conduct of the parties indicated they had entered

into such a contract. There is plausible legal reasoning that permits this kind of reading of these spiderwebs of contractual arrangements. In fact, sometimes courts do choose to so interpret a manipulative design of contracts. But they do this rarely, very rarely.

## THE IDEOLOGY

One of the reasons for the widely shared reluctance to cut through the legally created maze of contracts is that, ideologically, as the terms and conditions of any one contract are seen to be the result of voluntary decision-making by private actors, each of the parties should be deemed to have entered into the arrangement as a matter of choice. Judges and tribunals, imbued with liberalism's basic tenet that all individuals should be allowed to act and think as they see fit, accord the utmost respect to whatever arrangements have been made, unless they are obviously not made in good faith. Legal functionaries have been educated to think that they are not justified in reading terms and conditions into these voluntarily reached, apparently self-standing contracts unless it is absolutely necessary in order to make sense of them. They hardly ever find it necessary. As we shall see, all too often this approach yields bad outcomes which tend to undermine the pretense that law is a neutral institution, one which allows brutish repression of vulnerable workers. Legislators in the jurisdictions under discussion have been forced to create exceptions to the privity of contract rules adhered to by the judiciary by inserting some alleviating conditions into contracts of employment. There will be some elaboration of the nature and extent of these remedial measures below. To anticipate: the conclusion is that the remedies crafted, while becoming ever more numerous, do not challenge the default position developed by the courts, one which leaves workers at a serious disadvantage.

## THE ESTABLISHMENT AND NATURE OF THE LEGAL DEFAULT POSITION

The much-hailed advance that the movement from an authoritarian feudalism, from a status society, to a liberal capitalist one, to a contract-based society, was based on the fact that, for the first time, all individuals, being autonomous actors, were equally free to do with their resources and talents as they chose. For those without resources, it meant that they were free to sell their labour power, that is, their talents and capabilities, in any

way they chose. This “freedom” is an essential pillar of capitalist relations of production. It is the baseline to which employers return, again and again, as they seek to dilute protections workers had won as they got legislatures to impose terms in contracts of employment that they could not win at the bargaining table. As employers do so, they are exploiting the fact that the contract of employment is only one way in which those without resources can exercise their freedom to make their capacities available to others willing to pay for them. The legally enforceable contract has been—and continues to be—instrumentally and ideologically important to capitalists, but it is not essential to their overall project. The default position, namely, that those with no capital to invest other than their capacity to work are free to sell it is the foundation stone on which the capitalist class relies.

## A REVERSAL: WORKERS DEFEND THE CONTRACT OF EMPLOYMENT, EMPLOYERS WANT TO ENFEEBLE ITS HOLD

It is true, of course, that the contract of employment became the “normal” way in which capitalists purchased the talents and abilities of workers with whom they negotiated as legally equal individuals, even as it always was as obvious as it possibly could be that those workers were, in fact, nothing like economic equals. Judicially developed law ignored this on-the-ground fact and gave force to such individually bargained contracts. Employers benefited enormously. Workers fought extremely hard to offset the advantage their employers had when bargaining, and, over time, they won protections to be written into employment contracts. The contract of employment, with attendant legislative safeguards, emerged as the norm of productive capitalist activities. It became naturalized.

Naturalized or not, the fact that supposedly freely entered into contracts came with some built-in protections for workers was always resented by the employing class. Unsurprisingly, when changed conditions and power relations created the need and opportunity to roll back those costly protections, the employers went on the offensive. As a class, they have attacked governments that try to maintain these worker protections. Increasingly, individual employers are going back to the long-hidden basics: they try to buy the talents and abilities of needed workers without entering into what they now perceive to be “blighted” contracts of employment. This push gained strength from the 1970s onwards.

Economic changes, novel modes of production spawned by new technologies, and the associated increase in the ability to produce, assemble, and transport in ever-more-globalized ways all led to the understanding that the institution of the employment contract that had emerged over time was no longer as convenient, as necessary, as it had been. It could be refashioned, modified, even abandoned and still yield the desired capitalist goals. An obvious benefit would be the erosion of those pesky and costly legislative protections embedded in contracts of employment.

This kind of thinking has stimulated employers and their legal advisers to get work done in less traditional ways. Capital has been able to marginalize costly worker-protecting regimes. Workers and their allies, in reaction, are busy retooling. Protective labour laws no longer do their job. Australian professor of law Chris Arup has noted that "destructurization has challenged the capacity of law to operate efficiently, achieve social justice, represent universal aspirations … [labour lawyers are forced into] exploring new ways to reconcile work with welfare, efficiency with fairness, promotion with protection, economy with society." The employing class's intellectual gatekeepers argue that employers are not malevolent; they are driven by the logic of the impersonal market to avoid the contract of employment and its safeguards for workers. As they make this argument, they remind one of the character played by the comedian Flip Wilson, who, when caught doing something ignoble, would say "The devil made me do it."

Employers argue that the new pressures exerted by the fast-evolving, more fiercely competitive globalized and technological innovative environment are forcing them to reduce the costs associated with the social wage and imposed standards and conditions of employment that had been promoted in the aftermath of World War II. These costs can no longer be afforded. Employers are pushing for the deregulation of financial markets and the deregulation of trading in goods and services; they are pressing for the reduction of social expenditures, the privatization of services. To help them along, they have had think tanks promote individualism and consumerism, which go a long way toward undermining working class solidarity. As well, they lobby effectively for the deregulation of labour markets.

This is the context in which they have been able to deploy two closely interrelated, indeed overlapping, tools the law provides for their use:

(a) **Redefining the contract of employment:** The legally imposed responsibilities and obligations which attend a modern contract of employment will not become operative if it can be demonstrated that workers who are performing tasks directly for them and for which they are being remunerated according to agreed-upon contractual terms do not do so as parties to a legally defined contract of employment. This motivates capitalists to arm themselves with legally respectable arguments to deny the existence of such a contract of employment, *narrowly* defined, between themselves and persons who perform tasks for them. If they can classify existing contracts for paid work in this way, those task performers will be ineligible to claim the benefits bestowed by minimum employment standards and union-promoting legislation, diminishing the cost of production for the capitalists.

(b) **Reliance on economic power and legal trickery, not contract:** The second tool is the establishment of a ring of functionally integrated contracts that allow capitalists to claim that there simply was never a contract of any kind between the profit-seeker and workers. This is a more refined version of the first stratagem. It is a more consciously designed shedding of responsibility by profit-seekers. The wide and successful use of legal manipulation and novel technology that establishes a network of contracts which allows labour power to be exploited functionally without ever forming a direct contract between employers and workers plays, as we shall see, an important role in the enlargement of the proportion of the working class that lives truly precariously.

It is notable that both tools deploy established legal principles to help capitalists resume the dominium over labour they enjoyed at the inception of modern capitalism. It is notable because, as has been seen, it was law's interventions which had given workers the protections they won. It is now law which is deployed to assault them. This reversal in the use made of law is made possible because those instrumental worker-assisting interventions never challenged fundamental features of capitalist relations of production.

Law's non-instrumental roles, its structural and ideological roles (its support for private property, for individualism over collectivism, and its notions about freedom of contract) make it easily available to undermine the scope and range of employment contracts and to marginalize the minimum standards that had been crafted. This assertion needs some elaboration. Let me begin by sketching the way in which the worker-protection-encrusted contract of employment came to be cherished by workers and hated by employers.

## THE STANDARD CONTRACT OF EMPLOYMENT

In chapter three, the story told was how the end of World War II marked the emergence of economic and political conditions which, in the Anglo-American jurisdictions, allowed workers to take giant steps. In a few short years, they were able to win legitimacy for some collectivized responses to employer pressures, to gain statutory floors to protect the more vulnerable, and to have the social wage enriched. All this made them, as a class, less needy and, therefore, better able to resist attacks on their living standards. Anti-discriminatory laws came into force. This, too, blunted the power of the employing class, as its ability to divide and conquer was diminished.

The contracts formed within this context of restrictions and imposed terms and conditions came to be called standard contracts of employment. Canadian labour and feminism professor Judy Fudge describes them as ensembles "of institutions, along with the vertically integrated enterprise, the industrial union, the male-breadwinner for the family, and the state as employer and provider of services." The standard contract of employment, she continues, provides "a stable, socially protected, dependent, full-time job the basic conditions of which (working time and pay) are regulated to a minimum level by collective agreement or by labour law."

It is in this context that commentators began to talk of a new industrial citizenship. Indeed, these developments led to some stimulating scholarly disputes about the nature of employer-employee relations. Were they truly based on contract or had a new status relationship evolved? Did the massive restructuring of labour markets mean that the formation of a contract of employment no longer determined the character of the relationship, even though it was formally necessary to create the relationship to which the interventions with labour markets were to apply? These intriguing

speculations reflected a new optimism, a world view that the bad, old class conflict times had been shunted aside (perhaps forever). But those upbeat speculations were always too sanguine.

First, the way in which the standard employment contract is described above makes it clear that the gold standard only applied in certain settings and favoured certain people, namely, male breadwinners in major, large-scale industrial employment settings, a rather narrow slice of the working class. While other people's contracts, say, those of caretakers or cleaners, *looked* the same, the protections and packages available for them often were considerably less rich. Second, the argument that individual contract-making no longer ruled to oppress workers, as it had in the past, assumed that it was the unfettered contract of employment that had led to the hardships inflicted on workers. This was only partially true. Those earlier periods, as capitalist relations of production weaned themselves off feudalism, were a time during which the privately arranged legal contract of employment played a less-than-substantial role in the setting of terms and conditions. Much was left to the *constructed* markets in which these contracts were forged. The markets in which those "free" contracts were formed were framed and moulded by instruments and institutions such as slavery laws, Poor Laws, the Master and Servant Acts, as well as by legislative and judicial restraints and restrictions on collective action. These instruments, institutions, and judicial doctrines often overlapped and persisted in some form or another for a long period.

This brings me back to the observations about what freedom to contract truly signified. While in those early days, the setting in which contracts of employment were concluded heavily favoured the employing class, the legal enforceability of a contract of employment was important to employers for a conceptual reason as well. It enshrined the legal and political validity of the freedom of individuals to sell their talents and abilities, to enter into work-for-wages relationships with or without a formal contract of employment. Later, much later and only for a while, this was hidden from view as, in the aftermath of the World War II period, the outcomes of employment contracts were so much better for a goodly number of workers (but never a majority). This did not mean that the conceptual framework that saw the contract of employment as a particular

manifestation of a larger principle, the freedom of workers to sell their talents and abilities, had lost its original significance.

To return: the capital-labour struggles which led to the evolution of the standard contract of employment led many to believe that a new stage had been reached. Now there was a new status for workers, not one which demeaned them, as earlier contracts of employment had, but one which bestowed the sovereignty which free people are to be accorded. Paradoxically, in the phrase "standard contract of employment," the word "contract" was not accorded much respect. But, of course, it retained its salience.

## INTERVENTIONS TO MAKE THE CONTRACT OF EMPLOYMENT LESS OPPRESSIVE

The formation of a contract of employment was the pivot on which workers' entitlements and obligations were to be based. So it was, and remains, true that employers will not be responsible for any harm caused to third parties by workers' conduct unless those workers are employees. It was, and remains, true that workers, in order to get legitimacy to unionize and to use a measure of collective bargaining power, have to establish that the union is one of employees as defined by law. It was, and remains, true that workers are not entitled to get State-sponsored unemployment benefits unless they had been engaged in contracts of employment; the same goes for government pension plan benefits and workers' compensation entitlements. Less obviously, when decisions have to be made about payroll taxes or the application of a social insurance regime, a contract of employment finding is necessitated. The contract of employment played and plays a central role.

On a daily basis, capital and labour struggles are centred on the metes and bounds of the contract of employment. Its existence determines rights and obligations at work. It determines the extent to which the otherwise untrammelled economic power of the owners of the means of production has been constrained by legal interventions. Therefore, the legal definition of a contract of employment is important. Once we know what it is, we will be able to see how a well-advised employing class is enabled to manipulate the legal definition in order to avoid burdens imposed by contract-of-employment-based laws while retaining the benefit of the worker's freedom to sell their labour power. For it is the latter which matters.

The freedom to sell labour power is endorsed each and every time the validity of a contract of employment is put in issue. It is the rarely mentioned general premise on which the specific freedom to enter into contracts of employment rests.

### WHEN IS AN ENFORCEABLE CONTRACT TO PERFORM WORK FOR WAGES A CONTRACT OF EMPLOYMENT? THE FUTILE SEARCH FOR A FORMULA

As feudalism was ending, it was those with no interest in land or membership in a craft or trade guild who were the first to be subjugated to individual bargaining. Their numbers increased as more people became dispossessed, as land use and the overall economy changed and new technologies began to make inroads into the monopolies of trades and crafts. The outcomes were harsh. The men and women who were forced to enter into these “free” arrangements occupied the bottom rungs of society’s ladder. The discussion of the development of the inducement of a breach of contract tort action in chapter four showed that, even halfway through the 19th century, it was controversial to think of “free” persons as servants. Free persons were persons who did not depend on others for their income. Whatever the arrangement to perform tasks was, there was a bias against viewing it as a contract of service, as a contract of employment, if one of the parties had some independent economic standing. For a contract of employment to exist, for there to be an employer and an employee, one party, the employer, was truly free, truly independent; the other, the worker deemed to be a servant, was neither free nor independent because the worker had been obliged to enter into the arrangement to survive. One party was inferior to the other.

Starting with this notion, it was an easy step for the law to hold that what translated an arrangement to work for wages into a contract of employment was the level of control exercised by one over the other. This principle was initially formulated by the courts when they were asked to determine whether one person could be made responsible for the wrongful conduct of another who had agreed to perform paid-for tasks for the person sought to be made liable.

The issue of responsibility for other persons’ conduct was (and still is) troublesome for a legal system that espouses the principle of sovereignty of all individuals. To shift responsibility from one sovereign individual to

another should be anathema. Vicarious responsibility for other autonomous actors sits uneasily with the inherent properties of individual autonomy. Courts were, therefore, always pleased if they could finesse the issue by making a finding that any attribution of responsibility to the master would not amount to a finding of vicarious responsibility. This could be done if courts could characterize the situation before them as one in which the master had in fact engaged in the harm-causing conduct, even though a worker had been involved, that is, if workers could be portrayed to be more like inert equipment than flesh-and-blood individuals. To make this a plausible portrayal, the workers' lack of discrete input became the determining factor. One influential judge, Baron Bramwell, gave his imprimatur to this understanding.

## THE BRAMWELL GAMBIT

To fix a master with liability for an act done by another person, control by the master-employer over the actual way in which tasks were to be performed was to be the determining criterion, said Bramwell in a decision he handed down in 1880. This formulation was designed to be a short step up from the situation where the worker could be equated with being just a tool, an extension of the master's mind and muscles. Small as Bramwell's step was, capitalists reacted vigorously to the increased legal risks his formula created. Whenever possible, they deployed a weapon that is alive and well today. They would argue that, in their particular circumstance, there was no privity of contract between them and the people who did the work. There were, in fact, still quite a number of situations in which this argument was plausible. English labour history scholar Simon Deakin has shown that, well into the early 20th century, it was common to find what he calls "internal contracting" in England. Labour was hired through intermediaries in road building, construction, ship building, mining, quarrying, and iron and steel industries. The intermediary, often known as a butty worker or foreman, was the person to whom workers claiming rights and outsiders seeking redress had to address their complaints. Readers will see the similarity of these evasive ploys to those used in the two scenarios with which this chapter commenced. The message is clear: the drive to maximize profits has always led—and should be expected to continue to

lead—capitalists to avoid legal developments that increase their costs. This, in turn, is always met by push-back by workers.

## FORCED JETTISONING OF THE BRAMWELL APPROACH

As industrial and trade activities became more and more complex, as modes of production became more sophisticated and involved more people in any one firm, fewer and fewer circumstances involved workers who had no agency at all. The pressure on courts and legislators to widen the definition of employment contracts increased.

The argument that gained traction was that, if control was to be a criterion, it should encompass situations even where the buyer of services did not, in fact, directly control *how* the workers' tasks were to be done. It should be sufficient if purchasers of workers' talents and skills could control where, when, for how long, and with which assets the tasks should be performed. A standard decision cited to justify this extension of the control criterion was one in which the classification of a circus worker, a trapeze artist, was at issue. Plainly the owners of the firm which hired this performer could not perform the tricks they wanted done; equally clearly, they could not tell him how to jump and swing. They had to give him a good deal of discretion as to *how* he was going to use his skills. But they had lots of control over other aspects of the relationship, enough to make it a contract of employment, one to which protective legislation could be applied. They could dictate the numbers of performances, where and when they were to be offered, and the like. And they provided the tent, the sawdust, the swings and ropes, and so forth. It was held that, in the circus case, there were sufficient indicia of control for there to be an employment contract for the purposes of the governing workers' compensation statute to apply.

The goalposts had been moved: the test now was not just whether persons said to be employers had control over how work was to be done but, rather, whether they had a right of control overall. This left a great deal to interpretation and, therefore, uncertainty. Ever since, scholars, courts, administrators, and adjudicators have been looking for a formula to enable them to feel scientific as they allocate duties and responsibilities. This quest for a scientific, a formulaic, approach was brought into sharp relief by the much-cited 1968 decision in *Ready Mixed Concrete (South East) Ltd.* v.

*Minister of Pensions*. It is cited so often because the presiding judge, after going through an exhaustive review of Anglo-American precedents, came up with a handy three-limbed formula, a sort of eureka moment.

### THE MACKENNA GAMBIT

The judge, MacKenna, J., held that if (a) workers, in consideration of remuneration, agree to provide their own work and skill to perform some service; (b) workers agree, explicitly or implicitly, to subject themselves to the control of the other party to an unquantifiable degree; and (c) the other provisions of the contract are not inconsistent with a contract of employment, then there will be a contract of employment. The imprecision of this formula, designed to indicate that the definition of a contract of employment was an exercise in precision, could not be more obvious. The first limb simply says that a contract to perform services *might* be a contract of employment; the second that, if one party controls the other, it *might* be a contract of employment; the third says it *might* not be. The eureka moment really wasn't. What had impelled the presiding judge to formulate a handy three-limbed test was his research of the law. It was a mess and it needed to be cleared up.

What the presiding judge in *Ready Mixed Concrete* had found was that courts and tribunals used a variety of indicators to determine whether a contract to perform tasks for remuneration amounted to a contract of employment. A non-exhaustive list included: whether the putative employer exercised actual or had residual control, a question in which the level of skill of the putative employee was a factor; whether a formally written contract designated it to be one of employment or whether some conventional practices suggested it to be so; whether the workers brought their own equipment to perform the tasks or whether the possible employers supplied or paid for the bulk of the equipment; whether there was a specific time schedule or whether the person hired was working less than the standard working week; whether remuneration was calculated by reference to hours worked or bore some relationship to output; whether time and wage books were used, whether tax deductions were made by the putative employer, whether entitlements such as annual leave were agreed upon … All of these factors had been, and continue to be, treated as indicia of the existence of a contract of employment; none is considered more significant

than any other; none is dispositive of the question before a court of tribunal; the existence of one combination, rather than any other, of these kinds of features will not dictate what the decision should be. The fraught nature of this kind of exercise is what pushed the presiding judge to look for a scientific way out in the *Ready Mixed Concrete* case.

In that case a concrete-manufacturing company had entered into a written contract with a man named Latimer. The document explicitly stated that Latimer was an independent contractor, not an employee. The contract stipulated that Latimer was to carry concrete by truck to the company's customers as speedily and efficiently as possible. Latimer was to maintain the truck in good condition and to drive carefully. He was to be paid by the miles he drove, earning more the greater the distance. Latimer had to use a truck he had bought from a finance organization associated with the concrete company. Latimer had to acquire the appropriate licence and had to maintain the truck and insure it. The truck was to carry the company's name and brand colours. Latimer could hire other drivers to do the driving, but whoever drove the truck had to wear the company's uniform. Latimer's bookkeeping was to be done by the company's accountant, and, if major repairs to the truck were needed, the company was to be responsible for the costs.

After reviewing all the authorities, the presiding judge, MacKenna, J., formulated the three-limbed test which he believed he could derive from the list of usual factors considered and then applied it to the facts before him. He then, rather tremulously, decided that the formula suggested that the duties to which the parties had agreed created "obligations *more consistent I think*, with a contract of carriage than with one of service."

He held that Latimer was an independent contractor, not an employee. The four words I have emphasized speak loudly to the fact that the third limb—namely, is there anything inconsistent with finding the existence of a contract of employment?—turned MacKenna's three-pronged formula into anything but a rule which brings certainty to the law.

All this is embarrassing for legal functionaries. Inevitably, courts, adjudicators, and scholarly commentators continue to look for a silver bullet, to assure us with some catchy phrase that theirs is a scientific exercise, one which permits people to go about their business with certainty.

One favourite formula is that a contract of service is a contract of employment, while a contract for services is not. How it is to be decided that it is one or the other? There is no guidance. Adjudicators are thrown back into the pit, looking to indicia of the kind listed above. Inevitably, other formulas are furnished. One is that the test of being a servant is whether the person performing the task is doing so as a person who is integral to an organization. This is scarcely more satisfactory. It begs as many questions as it answers. Robert Flannigan, a professor at the University of Saskatchewan College of Law, pointedly gives the example of a general contractor on a construction site who hires a number of trades to do work for remuneration: electricians, painters, carpenters, plumbers, and the like. These services are provided by specialized firms who have the necessary qualified people on their books. To a lay person, it is likely that they would appear to be integral to the general contractor's organization, but it is dubious whether a court or an administrator of a protective legislative scheme would deem the firms and the workers they provide to be employees of the general contractor. So the "integral to the organization" formula has had to be recast. The new and improved version postulates that what makes persons employees is not so much a question of whether they are integral to the organization, but rather whether they are "part and parcel" of it. Presumably the hope is that this phrasing will enable decision-makers to avoid having to be all that precise about the hard-to-limit scope of a business's or enterprise's operations. It turns out not to be much of a solution.

Applying the "part and parcel" test, decision-makers quickly find themselves returning to the numerous indicia developed to assess the levels and nature of control over the performance of tasks demanded by the business or enterprise. Thus, Denning, L.J., a judge central to the design of both the "integral" and "part and parcel" tests, offered an illustration as to how such tests might help decision-makers but only succeeded in demonstrating how fraught the tests are. He suggested that it might be that a journalist working at a newspaper would be an employee, whereas a regular paid contributor to that same newspaper might not be. This is truly unpersuasive. To hold that one of those workers is integral or part and parcel of the newspaper/organization and the other is not is arbitrary: the

newspaper has a need for both as part of its normal functioning, and they perform similar services for it.

If any advance was made by these formulations, it came not from those parts of the phrasing which used the words “integral” or “part and parcel” but from the use of the word “organization.” It reflects better the more sophisticated, complex, and compartmentalized entities that have evolved as capitalism has matured, as new modes of production have evolved. The word “organization” allows situations to be covered where highly skilled workers, including many professionals, working in distinct departments, can be thought of as employees at a time when the legislative regimes and incidence of social wage policies are intended to reach more people. This acknowledgement of change, however, is not the only implied meaning of the emphasis put on “organization” when devising tests. There also is a suggestion that, when determining entitlements and obligations, no weight should be given to whether a producer of goods and services is run for profit. The fact that the legislative and policy interventions had been necessitated by the vulnerabilities created for the many by the dominant class seeking to exploit them as they drive to improve their profit is—fortuitously or deliberately—de-emphasized.

There are other formulas available to legal functionaries as they determine entitlements and obligations. One that preceded the “integral” or “part and parcel” to the organization formula and which has many adherents was formulated in a case named *Montreal* v. *Montreal Locomotive Works, Ltd.* The decision was written by the Privy Council, then the highest court in the Canadian (and much of the former empire’s) judicial system. Acknowledging that a test that emphasized the extent of control over the performer of tasks was limited because its perspective of contractual relationship relied on the way in which the putative employer exercised its power, the Privy Council proposed a four-limbed test which took into consideration what the contract looked like from the workers’ position, as well as from the business’s or organization’s vantage point. The four limbs of this formula were: the extent of control, whether workers owned the tools used, and whether they had the opportunity of making a profit and ran a risk of incurring a loss.

If this test had been applied by MacKenna, J., in the *Ready Mixed Concrete* case, the result might have been different: the business did

exercise considerable control over Latimer, did have some real interest in the equipment, that is, the truck, and while Latimer could earn money while not doing the work himself, he had very little opportunity to vary the amount he would receive—his earnings depended on the amount of work Ready Mixed Concrete chose to give him. He had very little say in the matter. Both his risk of loss and chance of varying his profit were limited. Latimer might well have been adjudged to be an employee. As it was, the presiding judge in *Ready Mixed Concrete* (without formally rejecting the *Montreal Locomotive Works* test) devised his own formula which allowed him to conclude (rather hesitantly) that Latimer, the truck driver, was not an employee. But this is legal nitpicking: there is no certainty that if the *Montreal Locomotive Works* test had been applied by the *Ready Mixed Concrete* judge, he would have come to a different conclusion. The *Montreal Locomotive Works* test, too, is highly malleable and manipulable, and any judge who preferred the social results which a finding of no contract of employment would bring could have plausibly based such a finding on the *Montreal Locomotive Works* test.

## SPECULATION ABOUT UNARTICULATED RATIONALES

In the end, then, we are left with open-ended formulations which lend themselves to interpretations and applications which are not based on precise criteria which can be ranked in order of significance. Still, some conclusions can be drawn, and they throw some light on the way in which our self-proclaimed liberal legal system deals with capital-labour relations in a capitalist setting.

It is clear that, for an employment contract to exist, law acknowledges that one party will be able to exercise control over the other. Despite the imprecision of the analyses on offer, there is a constant acknowledgement that a contract of employment is, functionally if not legally, a contract where one party exercises power over the other; it is a contract of subordination. As new modes of production and enterprise organization evolved, this verity has receded from public consciousness but remains a basic truth. As the legal meaning of control was no longer limited by the buyer of services having control over how the tasks were to be performed, persons of relatively high status in our society, professionals, people with skills which require a good deal of training and/or education, could be

deemed to be under sufficient control to be employees. They were not so obviously subordinate, and there are many more of these different kinds of people who are forced to sell their talents and skills. It is now much easier to see the Johanna Wagners of the world as employees. In a sense, this has swollen the size of the working class in a legal polity which pretends that class division has no salience. The conceptual discomfort this causes is revealed by the fact that many of these "higher-status" employees are often said to be (indeed, often call themselves) middle class, an appellation that has more to do with their status and income than with their concrete relationship to the persons—the capitalists—for whom they perform tasks.

There is, then, an unarticulated residual notion that the classification "employee" should be reserved for people who, in status terms, approximate the old category of servants rather than those engaged in occupations which give them a higher status because of their education and training. One variant of this intuitive thinking suggests to adjudicators that persons whose skills, talents, and resources should enable them to run their own enterprises for profit should not be classified as mere employees. Thus it is that, when workers contribute a considerable amount of the equipment to be deployed when performing contracted-for tasks, the formulas and judicial decisions suggest that the relationship between the purchaser and vendor of services will be one between similarly placed private actors, both pursuing the private accumulation of wealth. In legal terms, they seem equally *independent*. This word matters: it suggests a retention of sovereignty, one which manifestly is illusory in a contract between a master and a servant. It is in this sense that the *Montreal Locomotive Works*' "chance of risk and opportunity for profits" criteria come to play a part. If the equipment provided by the performer of set tasks is costly and requires skill to operate, say, a truck or a crane or scaffolding to be erected on a site, the risk of loss is tangible, at least in money terms, in terms of the value of a commodity that might be damaged or lost. The person bringing such equipment along plus skills is more like a capitalist, a performer of work who is not being *personally* exploited. This line of reasoning is somewhat revelatory in its implications.

The contractors who bring substantial (likely costly) equipment to the contract table are more easily perceived as being both independent and at risk. The risk that is pertinent is the risk they run of the devaluation of their

property, their equipment, not a risk to their person. Workers who merely bring their intellectual and physical talents to that table will not be perceived, by law, as running an analogous risk. This is what makes them, more obviously, members of the working class: it is their intelligence and physicality which are at risk; it is their organic contribution which is at risk and which relegates them to the subordinate class. Those who make inorganic contributions to the productive activities—money, *matériel*, equipment—are more easily typed as members of the capitalist class, of the superior class. We will have cause to revisit this logic when the nature of the regulation of workplace health and safety is considered (chapter eleven). Let me simply assert here that this lack of respect for, this devaluation of, what workers risk is a primary reason why way too many workers are maimed and killed at work.

To return: in part, there is resonance for any holding that those who enter into contracts to perform work at the request of another, and who bring what are considered to be special skills (and, perhaps, some special tools or equipment), and who necessarily exercise a good deal of autonomy over the way in which they will perform the tasks should be treated as business persons in their own right. This impulse gains momentum, in part, from the homage that is paid to the small business operator in competitive capitalism, homage which often is supported by these small operators themselves. As vendors of talents and skills, they like the status of being entrepreneurs, rather than workers; the value put by society on being an independent business person is profound and widely shared. The ideal actors in a market system are, to cite the venerated Adam Smith, the butcher, the brewer, and the baker acting as sovereign, selfish, and competing individuals. They are to be admired. Politicians never tire of saying that they stand shoulder to shoulder with small business because it is the backbone of society. Thus, when employers seek to have persons classified as independent contractors, as self-standing business persons, they are saying that these people do not need anyone’s help. They should not want it. This is an appealing starting point for decision-makers.

Judges and administrative scheme adjudicators are in awkward positions. Likely many of them share this Adam Smithian world view, but they know that those before them who want to be called mere employees are doing so because they want help. And it is part of the role of these

judges and adjudicators to give content and meaning to any legislative protective regime which has been democratically created. Unconsciously, they may well be pleased that the jurisprudence and scholarly efforts to furnish them with firm rules when deciding who is and who is not an employee have proved to be so malleable. It enables them to weigh a lot of indicia of a specific relationship from within the framework of the protective scheme in issue: What are its purposes? Do they envisage that persons before them should be entitled to its benefits? If the answer to this (usually unarticulated) set of questions is yes, then the way the indicia or a formula are read will favour a finding of employment; if the answer is no, a finding of the existence of an independent contract may be rendered with plausibility, applying the same indicia or formula.

Allowing decision-makers unguided discretion leaves a lot of uncertainty. This is good for lawyers who can make pseudo-scientific arguments in favour of or against findings of the existence of a contract of employment. Lawyers on either side of such a case will profit. This open-endedness also suits employers. While to any one employer there is a danger that they may lose a specific case, for the employing class as a whole the existence of doubt about how any agreement to discharge tasks for remuneration will be viewed gives them room to deploy their manipulative powers. There are a wide variety of tools designed to these ends in common use, forcing legislatures to furnish remedial responses as workers, caught in the web of byzantine laws, struggle to survive. Both the tools used by the employing class and the responses by workers and legislators are the subject of the next chapter.

## SUMMATION

A contract is like a tiger, very beautiful to look at, but very dangerous to hold.

—WILLIAM GUTHRIE SPENCE, *Australia's Awakening*

1. The story told in this chapter is that capitalists will go to great lengths to escape legal regulations that fetter their profit-maximization drive. As the State had been pushed into imposing limits on the ability of the owners of the means of production to extract surplus value from workers, employers have deployed a variety of legal and scientific technologies to avoid the

costs of such interventions. They are aided by a built-in assumption, one which is rarely challenged directly. In contemporary capitalism, it is deemed to be brute common sense that it is a boon to workers that they have the “freedom” to offer themselves to perform tasks for remuneration.

2. Conceptually, the right to enter into legally enforceable agreements to work for wages is posited as a political and legal advance because it recognizes non-wealth owners as sovereign individuals who can think and act as they choose. Every person is acknowledged to be legally and politically equal to all others, including to the owners of the means of production. They can change their lives by entering into voluntary agreements by means of which they sell their talents and capacities to a willing purchaser. This had not been the case under feudalism, which attributed unchangeable status to individuals.
3. The freedom to sell workers’ talents and capacities needed to be operationalized. The contract of employment became the principal vehicle through which this was done.
4. As there were, and are, vastly more people without any other assets but their talents and capacities than there were, and are, potential purchasers of these talents and capacities, the supposedly voluntary contracts to work for wages were always going to (and still do) provide miserable outcomes for workers.
5. Workers came to see the individual contract of employment as the central problem. Workers and their allies concentrated on blunting the impacts of unequal bargaining by collectivizing and using their numbers to exact protections against the harmful exploitation that individual contract-making permitted. As well, they used their numbers to push governments to incorporate minimum standards into contracts of employment. They managed to have discriminatory practices legally inhibited, and the social wage (education, health, unemployment insurance, and pension schemes, in particular) was much enriched. The labour markets in which they were selling their talents and skills had been changed. The success of these struggles was, in large part, attributable to the dramatic changes in the political economic relations that came out of the post–World War II circumstances.
6. Workers have never been able to have the building blocks of capitalist relations of production rejected. The right to own private property, the

starting point that owners have the legitimate right to determine how it is to be used, the conceit that contracts for work are voluntary agreements between legal and political equals whose terms are not to be questioned and may only be changed by State interventions—all remain in place, despite many reforms.

7. This set the scene for the capitalist fight-back. As political circumstances and economic conditions changed from the 1970s onwards, employers felt that they could no longer afford the luxury of better-protected workers and campaigned to have worker protections rolled back. They have been very successful. Here note that the rollbacks of legal protections for workers are often referred to as industrial law "reforms," a word that is associated with progressive change but here is used in its literal sense: a re-formation of existing circumstances which, from a workers' perspective, turns out to be regressive.
8. Capitalists have been able to use two aspects of law in their drive to regain their ability to contain workers' demands. They make claims that, even though they may have contracted with another for that party to perform tasks for them, there is no contract of *employment* but rather a deal between independent business firms. Or they set up their firms by interposing a set of intermediaries between themselves and the workers who perform the needed tasks, using legal technology (corporations, integrated networks of related firms, privity of contract) or new scientific technologies, such as digital intermediating platforms.
9. Workers fight back. Mostly they urge administrators, adjudicators, policy-makers, and law-makers to widen the definition of "employee" so that more people who provide capitalists with services and who are just as subordinate as employees are will become entitled to the protective measures won over time. This is the focus of the next chapter. It addresses the tensions which surface as these struggles are waged. Do the tenets of legal and political equality or those of economic inequality that underpin capitalist relations of production hold sway? In the following chapters, the question to be confronted is: *Whose side is labour relations law on?*

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CHAPTER 7

# *A paradox: Workers' need to expand the scope of contracts of employment*

## A RESTATEMENT OF THE PROBLEM FACING WORKERS

The previous chapters argued that law provides the structural bases which allow the employing class to exercise its power. In particular, law enforces bargains entered into on this unequal basis as if they were contracts between legally and politically equal individuals. It applies this principle to work-for-wages contracts, assuming that persons without property who sell their talents and capacities do so as fully autonomous legal and political citizens. The outcomes are horrendous for those without property other than their personal talents and capacities. They struggle for amelioration, pushing the state to impose minimum conditions and terms in any "freely" entered into contract of employment. The owners of the means of production fight back. They are eager to regain the advantages they enjoyed before political interventions monkeyed with the common law laissez-faire doctrines which made it so easy to extract surplus value from their workforces. The result is that contract law becomes a terrain of contest.

Employers try to get work for wages done without having to meet the obligations that entering into a formal contract of employment brings with it. New modes of production are engineered by the employing class, modes which do not require directly entering into contracts of employment with workers. Workers seek to enlarge the sphere in which the entitlements that come with formal contracts of employment can be applied to the novel ways in which capitalists set up their profit-seeking activities. The working class emphasizes its need and dependency when performing work for wages. Employers point to their right to organize their businesses in any way they choose.

During the pandemic, Amazon grew as more people used it to sell and buy goods. Worldwide, its workforce grew to 2.2 million. Not counted in this staggering number are 500,000 truck drivers.

Once Amazon has brought ordered goods into the appropriate warehouse, they need to be shipped to the purchasers. This last-mile delivery is to be completed by truck drivers. Drivers may contract directly with Amazon or be supplied by small truck-owning firms. They drive trucks with Amazon logos, they wear Amazon uniforms, they are paid by the number of loads they deliver and are not guaranteed any number of loads, they are monitored by Amazon-installed cameras as they drive, and they are to abide by the timelines set for delivery by Amazon. Amazon has set up its last-mile delivery system in this way because it believes that this arrangement will enable it to avoid the costs of providing the entitlements dictated by employment laws.

Obviously the employer strategy to shift costs to workers used in 1968 in the *Ready Mixed Concrete* case (discussed at length in the previous chapter) is alive and well today. A December 2021 exposé in the *Toronto Star* reported that truck-owning companies frequently ask drivers to form a corporation. The drivers will, on behalf of this new person, bid for the contract the driver used to have. The driver will drive the truck as he always did but will do so now as an employee of the corporation he formed. This means that the hirers are not responsible for overtime pay, holiday or sick pay, severance compensation, and the like. This incorporation model is so pervasive that it has been given a name: “Driver Inc.” The calculation is that 20 percent of all truck drivers in Canada are classified as independent operators in this way, saving the hirers an average of $15,000 per worker; this saves Canadian trucking employers about $1 billion per year.

In capitalist relations of production, the maxim “The more it changes, the more it remains the same” is apt. All too often contracts between owners of the means of production and wannabe independent operators lead to terms and conditions which leave the aspirational entrepreneurs worse off than they would have been if they had been directly employed by the dominant firm. They are forced to seek to have themselves reclassified as employees. They claim that what appear to be freely entered into contracts between sovereign profit-seekers are “sham” contracts, as they are

popularly described in Australia, or “falsos,” as they are known in Spain. Occasionally, legislators, rendered uneasy as they see the protective schemes they created unravel, enact remedial measures.

## DEPENDENT CONTRACTORS

One such response is Canada’s adoption of a Scandinavian concept, namely, that some people should be considered to be “dependent contractors.” Canadian labour laws governing collective bargaining feature such a provision. In some situations, people contracted to supply services may be given the same access to collective bargaining that those who are adjudged to be employees, plain and simple, already have. The motivation for enacting such provisions is made crystal clear by the wording of some of the provincial statutes. They state explicitly that, if contractors own or lease a truck and are allowed to retain a sum of money after the cost of the performance of the contract to deliver is deducted, or where operators of a fishing vessel agree to be paid by accepting a portion of the gain made from the catch, they may be adjudged to be dependent contractors who are eligible to form a union. The objective is to counter the impact of traditional formulas which characterize owners of relatively expensive equipment or who share in profits as actors in business on their own account when their actual situation gives them little control over their so-called businesses.

This stratagem designed to overcome employers’ legal manipulation of employee-protecting legislation meets with various levels of success. The remedial provisions do not interpret themselves. A decision must be made as to whether claimants actually are dependent contractors. That is, are the claimants really enough like employees to entitle them to the benefits of the statute in question? Inevitably this question drives decision-makers into the morass which surrounds the classification of people who do tasks for remuneration described in the previous chapter. In one Ontario Labour Relations Board decision, the tribunal produced a list of eleven criteria to differentiate dependent contractors from independent ones. Most of these are criteria used by courts and tribunals when they determine whether a contract to do tasks for remuneration is an employment contract. This approach dilutes the impact of legislative measures such as Canada’s dependent contractor laws. While their mere existence does signify that the troublesome classification exercise is to be undertaken in a setting in which

there has been a signal by an elected body that adjudicators should seriously consider the inclusion of sellers of services to be entitled to a specific legislative protection, the persistence of the old thinking means that the decision-makers remain free to hold that not to do so might still be the right call. This leaves employers with a powerful incentive to continue to set up their purchases of services in ways which make them resemble bread-and-butter commercial contracts for the supply of services between consenting, autonomous capitalists.

Not only is uncertainty built into these attempted remedies, but these kinds of legislative interventions are aimed at a specific problem raised by facts on the ground. That is, the remedy on offer is not a complete answer to the problems faced by workers. Canada's dependent contractor provisions set out to create an opportunity for suppliers of services to form a union so as to give them some countervailing power when bargaining. They do not give those dependent contractors access to other benefits employees have won, say, standards in respect of leave, overtime, maximum hours, and the like. This is a good point at which to note that there always have been a large number of workers who are clearly employees who have not had access to all the gains made by other workers. For instance, in Canada, it is quite common to exclude agricultural and domestic workers from most employment standards and collective bargaining rights that are available to other employees. And, in various jurisdictions, temporary, casual, and part-time workers, all of whom are classified as employees, are not entitled to all of the protections granted to what used to be called standard contract employees. This, of course, creates another set of incentives for employers to organize their production in ways that allow them to avoid the cost of entitlements that presume the dominance of the standard contract of employment. It goes some way toward explaining why these so-called standard contracts of employment are no longer—if they ever were—a dominant norm. And there are many other *legal and legally approved* invitations to employers to explore ways to avoid the costs of hard-won worker-protection legislation.

As noted in the previous chapter, employers use the privity of contract argument to good effect. The two scenarios involving the use made of labour hire companies with which that chapter began are examples of the many guises this technique can adopt. A few other illustrations of how

law’s many capitalist-benefiting rules are combined to shift the costs from profit-making to workers follow. The employing class is very deliberate in its efforts to roll back any gains made by workers, and law generously accommodates its efforts.

## CORPORATIONS AS INTERMEDIARIES

One ploy is to take advantage of a legally created vehicle, the corporation. Law pretends that a properly registered corporation is a legal individual in its own right. It is separate from the people who created it, from the directors and managers who run it, from any creditors it has, from its workers, and from those who are entitled to share in its profits, the shareholders. I have documented elsewhere how these and other facets (limited liability and legal immunity for shareholders) make the corporate form a tool designed and used to avoid the risks capitalists are likely to run. So it is no surprise that it is used to avoid the costs of regulations which favour workers. The story of the Driver Inc. phenomenon used in the trucking industry described above exploits the corporate form for its machinations. It is all in a day’s work for the lawyers who serve capitalists; they call it good lawyering.

Around 2012, a large Australian corporation called Brambles Ltd. ran a fleet of specially equipped and branded trucks to pick up and return hospital clothing which it laundered. Truck drivers it employed had a set route which they served. Brambles, intent on saving costs, dismissed all its employees. It told them that, should they form their own corporation, that corporation could apply to serve their route and employ them to do the driving—in the same way they always had. An employee called Wail did all this and then got injured when loading his truck. Who was responsible to him for the injuries he suffered? The highest court in the land held that the interposition of corporations between Brambles and its former employees had made those corporations employers of those workers, who were also the sole owners, directors, managers, and employees of the new corporation. Accordingly, Wail’s corporation, as his employer, was to bear part of the costs of the damages awarded for Wail’s injuries. Some of the costs had been transferred from the real employer, Brambles, to the worker.

This interposition of a supposedly separate legal actor between the purchaser of services and the worker who is to deliver the tasks for

remuneration is used in a bewildering variety of ways. Legislators are continuously pressed to find responses to the cunning capitalists' reliance on the law's default requirement of privity of contract. One such response has been the legislative creation of accessorial responsibility.

As business firms take advantage of the corporate form to run their enterprises by means of a slew of different entities whose overall activities are integrated to attain a common end, workers run the risk of having their entitlements denied by their immediate employer, which is a member of such a family of corporations but which, in its own right, does not have the assets to meet its legal obligations to the workers. Common law does provide a remedy, but, in practice, it is ineffective. It will treat other corporations in the group as employers responsible for the debt owed to the workers, but only if there was an intention to create an employer-employee relationship between the worker and those other corporations in the group. This intention is very difficult to establish and the requirement has forced some legislatures to fill in the hole. In Canada there are statutory provisions which treat related corporations as employers for the purposes of enforcing employment standards entitlements. Not only do these provisions require a finding of what "related" or "associated" means (and that is not always so easy), but, for the most part, the provisions have required that, for the corporation to be liable as an employer, an associated or related entity in the integrated business must have acted with the motive to defeat, directly or indirectly, the intent and purpose of the protection-bestowing legislation. And note that even this limited extra protection applies to only some aspects of worker protection, just as the dependent contractor provisions in Canada advance only bargaining rights, but no other needed entitlements.

In the end, then, when it comes to these statutes that impose responsibility on a corporation which is related or associated with other businesses which have denied workers their entitlements, it is not enough, as it is not at common law, for there merely to be a relationship or association which shows that an entity is part of one business. Privity of contract and separate corporate personality retain their strong hold on legal thinking. All the more so because, as noted in the previous chapter, so many of the claimants for help started off by seeing and casting themselves as business persons, as individuals who are entrepreneurs, rather than workers. The difficulties created by the initial desire to be independent business

people, rather than employees, come out strongly in the debates which surround the commercial practices of franchising.

## FRANCHISES AS INTERMEDIARIES

Franchisors have a brand, a way of doing things, of presenting their products and services, which sets them apart. They choose to have their marketing done by franchisees, firms that agree to operate according to the franchisors' business model. The aim is to have standardized operations: uniforms, logos, inventory, processing, and delivering are replicated. McDonald's franchises in Rome, Melbourne, Singapore, and London exhibit instantly recognizable resemblances. This business model requires the franchisor to exercise a good deal of control over the franchisees which market its goods or services. While these franchisees are the hands-on operators and employ people, there should be resonance for any claim by franchisee employees whose statutory entitlements have been denied that both the franchisee and franchisor should be held liable to make good the loss. A number of legal principles could support such claims.

Why would the franchisor and its franchisees not be characterized as partners and, therefore, responsible for each other's conduct? By definition, a partnership is a firm in which two or more people carry on a business in common with a view to making a profit. This is exactly what the franchisors and franchisees are doing. Or there could be a good argument to make to the effect that the franchisor and its franchisees are related or associated employers, categories which, in respect of some entitlements and in some jurisdictions, make the associated or related employers responsible to meet statutory obligations owed to employees by the associated or related firm. But these approaches are rarely used. Ingrained patterns of legal thought create impediments.

Law prefers to see capital-labour relations as legal relations between individuals. As seen, this is embodied in the privity of contract doctrine. University of Cambridge labour law researcher Zoe Adams rightly notes that positioning workers and those they deliver services to for remuneration as isolated individuals means that, in law, it is these individuals' actions, rather than the reasons for their actions, which are decisive when their legal rights and duties are to be determined. The history and context are relegated in importance. The legal significance of this is that the way in which

property owners deploy their assets should not be second-guessed. Using independent contractors or franchisees as a way to maximize their return on their assets should be their decision, not anyone else's. The premise is that any non-prohibited way in which the owners of assets organize their profit-seeking activities is considered legitimate. If they select a mechanism that eschews the direct formation of contracts of employment with the actual workers/producers, they have not offended any principle.

These starting points lead to the tensions and uncertainties when those who seek to bring themselves under the protection of laws focused on a very specific type of legal relation, that of employer to employee, come to court or an administrative tribunal. The claim of protection seekers is that, even as they themselves thought they were independent firms or some kind of partners, just as the firm to which they deliver services legally characterized them, functionally they turned out to be dependent, very dependent, employees rather than in business for themselves. Often their plight will be so parlous that legislators and policy-makers feel themselves pushed to fashion remedies for the claimants. Thus, in the case of franchisees, the logic which demands that franchisors exercise a great deal of control over the franchisees all too frequently makes it hard for franchisees to make a living as they meet stringent requirements about stock, maintenance, and customer service. In response, franchisees are wont to cheat their customers or squeeze their employees as much as possible. Indeed, this is such a well-known phenomenon that sociologists and criminologists have given it a label. They argue that it forces the dependent franchisees to act deviantly. They label this kind of franchise organizational model to be a "criminogenic model."

Every now and again, a lot of publicity is given to gross maltreatment of workers in well-known franchise businesses such as McDonald's. This publicity forces law-makers to provide a remedy. But they do not do so by revisiting the basic legal presumptions about (a) individualism, (b) the accompanying doctrine of privity of contract, or (c) the sacrosanct nature of property ownership. They do not confront the underlying causes which lead to these kinds of problems. Rather, they give partial, immediate remedies.

One such remedy has been to make a finding that if the franchisor uses its power to control to set workers' terms and conditions *directly*, it should be held responsible for any statutory entitlements owed to these workers

when a franchisee had denied them. This dovetails with the preference of courts and tribunals to uphold the privity of contract doctrine. Direct control suggests a personal relationship, a private one. But, as franchisors are in a position to control the workers' immediate employer, *indirect* pressure on an all-too-often impecunious franchisee may leave franchisee employees without any remedy. Thus, many workers have no effective remedy.

In recent times there has been a movement to make franchisors responsible if they failed to keep a safe distance. As we should have come to expect, the newly crafted rules are flexible, varying a little from jurisdiction to jurisdiction. Still, the principle undergirding these rules is clear enough: for a franchisor not to be held responsible to workers, the necessary controls exercised by the franchisor should not involve substantial and significant control over daily employment-related matters. The devil lies in the details that are carved out on a case-by-case basis. For instance, it is clear that, should franchisors play a hands-on role in advertising for and hiring of franchisees' employees, or supervising those hired, or setting their wages and work hours, or play a direct role in disciplining, they will be saddled with legal responsibility for denied entitlements. Most of these criteria, however, do not advance the cause very much, as they approximate direct intervention in the franchisee-employee relationship. There is little guidance when less direct interventions will lead to franchisor responsibility. The more subtle questions as to when inequality of bargaining between franchisors and franchisees should make franchisors responsible for franchisees' misdeeds, that is, to have those misdeeds treated as the franchisor's misdeeds, remain unresolved. And so vulnerable workers continue to struggle to have protective laws apply to them.

Inasmuch as there is a push to tilt the terrain of contest more toward workers, it comes when widespread moral outrage is provoked by publicizing the names of well-known and respectable businesses associated with actors who abuse their workers. In Australia, a huge number of blue ribbon firms—including the two dominant supermarkets, Coles and Woolworths, shopping mall owner Wesfarmers, transnational corporations such as 7-Eleven, Domino's Pizza, Caltex Oil, Qantas, the Commonwealth Bank, celebrity chefs who run restaurant chains, and many more—were found to have lower-down-the-food-chain contractors and franchisees who, squeezed by the head firms, had underpaid their employees. It is in this

context that the states of Victoria and Queensland enacted special legislation to create a crime of wage theft. In this milieu, civil remedies were also fashioned. Australia's federal award-setting system was amended to make franchisors, licensors, and distributors liable to make good the losses of employees whose entitlements had been denied by franchisees, licensees, or distributors. Under the Australian legislation, the franchisor, licensor, or distributor must show that it took reasonable steps to stop violations by their franchisees, licensees, or distributing agents. It is too early to say what precautions will need to be taken to avert legal liability, but the spirit of the legislation is clear: social and political pressure has forced policy-makers to look at economic reality, to acknowledge that they have had to loosen the restraints imposed by the mantras of individualism and privity of contract. In this instance, the ability of large wealth owners to circumvent the costs of social wage measures has been blunted a little. Note that the 2017 Australian amendments to its *Fair Work Act* constitute an outlier. For the most part, courts, administrators, and legislators in Anglo-American jurisdictions, when fashioning some counters to capitalists' avoidance strategies, stick as closely as they can to the privity of contract and protection of property rights model. This preference comes to the fore when workers' entitlements are threatened by the modes of production which have come to be known as global value chains.

## GLOBAL VALUE CHAINS AS INTERMEDIARIES

There is nothing all that novel about capitalists scouring the planet to find cheap labour and materials, to situate themselves in countries whose governments do not impose costly regulations on profit-seeking activities. In recent times, globe-wide production and assembling has accelerated. In part, this trend is due to the fact that private wealth owners have been enabled, politically and economically, to trump domestic regulatory regimes even more than they could, aided by the mobility and increased immunity of finance capital and by the advent of game-changing new technologies, as well as by advances in transport and storage and, more generally, by the increased control bestowed on profit-seekers by electronic and digital tools. As author and blogger Susan Rosenthal writes, these conditions make it possible for a major firm to resource computer components in one country,

manufacture in another, assemble in a third, sell in a fourth, and service in a fifth.

Global supply chains are, in essence, the logical extension of the way in which local businesses fragment their productive activities by sub-contracting, franchising, using temporary employment agencies, and the like. But the outcome is a much more complex set of relations because of the number of entities involved, their different locales, and the different sets of domestic laws that are applicable. On the last point, as the chapters in this Part should have made clear, capitalists will be forum shopping for production sites where the formal legal regulation of worker's conditions is the least burdensome. In the end, at the pointy end, there are workers performing tasks in a legally created highly competitive setting, as local firms which are to employ them are engaged in a race to the bottom. These local firms compete with other cheap labour employers in many jurisdictions who also want to supply the lead firms in these global networks. A sense of this drive to the lowest level of costs is gained by noting that Walmart has 100,000 and Disney 30,000 businesses spread around the globe competing to get supply contracts from them. The potential criminogenic nature of this business model is all too apparent.

Global value chains, as a result, have come to be seen as the poster child of modern capitalist exploitation. There is outrage when it is revealed that many firms are able to get work done on the basis of terms and conditions they are not able to "enjoy" in their more regulated home nations. And the revelations are coming thick and fast, for example, in *The Fissured Workplace*, a recent bestseller by David Weil, of the US Department of Labor. The outrage is exacerbated by an overall sense of impotence. It is apparent that a system of worker protections tied to establishing the existence of private contractual relations between workers and those who benefit handsomely from their work is ill-equipped to deal with this kind of (legalized) very-long-arm's-length exploitation. Guilt plays a role in the outbursts of outrage. There is a rising consciousness that the large firms which deliver consumers goods and services at affordable prices in the richer capitalist nations have used their economic leverage and are implicating the consumers in their ruthless use of power. Add to this a growing awareness that some of the consumers' fellow citizens are being denied work they might cheerfully have done if only these significant firms

would have been willing to meet the legal obligations they have toward workers in these richer nations, and it is clear why there is a clamouring for change, for something be done. The focus is on making those who benefit pay as, functionally, it is well understood, they could redress the parlous circumstances of the many whose oppressions yield those rich benefits. This potent mix of moral disgust and economic *realpolitik* leads to pressure for amelioration. One response is the deployment of what is often termed "soft law."

There are many calls to make lead companies in these extensive networks liable to vulnerable and exploited workers at the coal face of the integrated production organizations. An initial problem is that law has no definition identifying lead companies. This creates a technical difficulty for those who advocate attributing responsibility to lead firms. But it ought not to be insuperable. Everyone knows that, when Walmart or Apple set up a chain-of-production-and-delivery scheme which spans the globe, they are lead firms, even if many decent-sized operators are part of the network. They are huge businesses operating at the top of their industries, which can, and do, set significant product, performance, and quality standards on a network of smaller businesses (to use Weil's formulation of a lead company). The greater difficulty is to devise remedies which can negate (a) the basic principle that entrepreneurs should be allowed to engage with each other in any way they choose, (b) the principle that different jurisdictions with different rules might well have different standards and rules than those of the domestic state in which the lead firm is domiciled, and (c) the respect our laws accord to privity of contract and the separate personality of connected firms in a network. All these default positions pose hurdles when seeking to impose responsibility for harms done to persons who do not have contractual relations with the lead firm and which might be inflicted by firms which, although linked with the lead firm, are autonomous in law.

Thus far, the difficulties have been too great. Such redress as there is has been spawned by the dangers lead firms see to their reputations and, thereby, to their markets, and by their anxiety that governments might be pressured into imposing curbs which will inhibit profit-seeking. This has meant that a lot of promises are made by leaders of global chains. They undertake to take more care when engaging people in other jurisdictions, that they will audit local practices and review the handing out of contracts.

There has been a flurry of high-minded proclamations of a newly found virtue as measures to do better are announced with much fanfare. Among the more famous of these are European corporations' Accord on Fire and Building Safety in Bangladesh and the US's matching Bangladesh Worker Safety Initiative, both launched in the aftermath of the 2013 Rana Plaza collapse in Dhaka.

But these and like statements of intent do not necessarily guarantee that the workers at the bottom end of the chains will be treated better. Inasmuch as evidence is being gathered, the picture remains spotty at best, gloomy at worst. For instance, the NGO KnowTheChain reports on how the 49 largest information, communication, and technology outfits (including Hewlett-Packard, Apple, Samsung, and Intel), with a combined capitalization of $5 trillion, are actually dealing with problems of forced labour in their supply chains. Using its own benchmarks, KnowTheChain finds that over three-quarters of these mammoth lead firms score less than 50 out of 100. Typically, the standards they impose on suppliers do not meet ILO core minimums in respect of freedom of association, collective bargaining, or controls on fees for so-called training (a frequently used means to exploit needy workers), or do not provide any mechanisms to ensure monitoring by independent agents to ensure compliance with the lead firm's demand that standards be met.

Still, there are real social pressures on lead firms. It is widely recognized that the drive for efficiencies which undergirds the establishment of global value chains brings with it the opportunities, all too often grasped, to engage in primitive exploitation of vulnerable workers. This dynamic animated Pope Francis when, in 2015, he stated that this kind of capitalism was nothing but a subtle dictatorship. It in this setting that more and more lead firms are prodded into making promises that raw exploitation will not occur on their watch. Occasionally they honour these promises. In a widely publicized case, the iPhone maker Apple put its supplying manufacturer in India on probation. It had discovered that the accommodation provided for workers who lived on site did not meet Apple's standards, nor was the food as safe and hygienic as Apple required it to be. The supplier in India was a major firm in its own right. It was Foxconn, a Taiwanese giant corporation. The fact that Apple (and any like-minded lead firm) can control conditions if it wants to do so is evidenced by

the way Apple acted in this case. But it rarely happens. The lead firms do not easily see the need to exercise their power, especially not if doing so might make their chosen way of doing business less useful. Thus, while Apple is getting favourable coverage for its disciplining of Foxconn, it is to be remembered that it had engaged Foxconn as a supplier even though it was as well aware as the rest of the world was that, a few years earlier, Foxconn's operations in China had been the source of outrage as working conditions there had led to an astonishing rate of suicides by oppressed workers.

The problem is that, while there are social pressures because firms do rely on their reputation to maintain their market share, for the most part the suppliers are much smaller than Foxconn, less known, and flung across the globe, making it less likely for lead firms to have their brand affected by exploitation somewhere in their chains. All too often they may plausibly argue that they have promulgated their expectations but that they have no first-hand knowledge of what is going on at the bottom of the chain. Social pressures are not self-enforcing, and there are no legal inhibitions on setting up global value chains which provide platforms for primitive exploitation. Schemes of worker protections based on privity of contract have but little impact. In response, a movement has arisen that seeks to overcome the shortfalls of labour relations laws by turning to the sphere of human rights.

### *Labour rights as human rights*

The claim of the movement is that denial of basic protections for workers denies them their universal human rights. This debate, while interesting and involving many activists, takes me beyond the scope of my work. But it may be useful to note that the human rights ploy also is faced with grave problems. First, there is no agreement that, in principle, so-called universal human rights apply or should apply to the repression of collective and economic rights. To many observers and policy-makers, human rights are rights that belong to individuals; they are rights that support liberalism's precepts about individualism. Second, while it is argued that human rights are universal, some of the violations may actually be condoned by legally sovereign governments. Relatedly, it is very difficult to enforce international human rights laws. In the end, the use of global value chains

continues to allow capitalists to relieve themselves of the burdens imposed by regulations that protect workers.

So does the newly labelled sphere of "platform-mediated work." Here, looking for anything which resembles an employment relationship to which worker protections might be tied is even more fraught than it is in other indirect work relationships. Somewhat surprisingly, this has led to more positive worker-protection remedies than are to be found elsewhere.

## DIGITAL PLATFORMS AS INTERMEDIARIES

In this new world, the delivery of work by one person to others is facilitated by means of digital technology, a platform. In some cases, but not always, the owner of the platform may be the actual paymaster of the person doing the work. When it is not, it is difficult, at least in law, to see how anything approximating an employment relationship exists. It is hard to see that something like a contract of *work* for wages has been created. It is not as difficult to maintain such an argument, however, where the platform owner takes charge of remunerating the worker, even though the service rendered is provided for another party altogether. Even here, though, the notion that there is an employer-employee relationship remains contestable, and it is fiercely contested. The two different scenarios are sketched out briefly.

**Scenario 1:** A platform may be designed to give those wanting to sell their services a place to post their availability, their skills and experiences, and other such details. Individuals needing assistance or businesses needing a service may deal directly with the seller of services via the platform. Other platforms allow individuals or firms to post a job they want done on the site and invite bids from would-be performers. In both cases, the platform is not responsible for paying the workers when they have completed their tasks. The task may be anything from designing a graphic layout, to editing a piece of writing, to running an errand, to delivering a package. The platform providers have but the slightest of interests in the performance of the work. Well-known platforms of this kind include Amazon Mechanical Turk, TaskRabbit, and Etsy.

Once the task is completed, the relationship ends. A series of stand-alone relationships are created between businesses looking for a just-in-time component part of their overall for-profit enterprises, or by individuals who

need a service rendered for non-profit purposes. The renowned French legal scholar Alain Supiot observed that, traditionally, employment involved a bargain in which a worker offered obedience in return for some security. The platform-type arrangements thus far described do not involve the giving of orders by one party to the other, as much as an agreement by the performer to meet specific and time-limited objectives set by the other party. On the face of it, such arrangements look more like contracts between independent businesses and individuals than contracts of employment to which legislative protections adhere.

But it is not as if those performers of tasks do not need protection from exploitation. Many earn their living, or a very substantial part of it, by being platform workers. They are required to keep their resumés up to date and conveniently accessible at all times. They need to keep a watchful eye on all the platforms that they rely upon. The platforms on which businesses post their requests force workers who need these contracts to survive to be online most of the time. The posting of a job can come up any time. They may have to bid against workers from many other parts of the world, if the task can be performed online, or against many locals, if the task requires a physical presence. They take a risk in respect of the hirer's ability and/or willingness to pay; they may have to give up whatever intellectual property they might have in any design they produce. Their future opportunities to compete successfully for these kinds of jobs—which, it must be repeated, are crucial to most of these workers—are always at risk because any hirer's unfavourable review of the worker's performance will be available to anyone using the platform.

In sum, they are contractors with very feeble bargaining powers, subject to disciplinary tools over which they have no control. Yet they are not easily brought under the umbrellas of legislative protections as their use of the platforms suggests, at least in law, that they are acting as self-employed people. The quantity of customers they have makes them distinguishable from dependent contractors, who are deemed employees for some limited purposes because they have no choice but to work for one firm.

**Scenario 2:** The second kind of platforms to be discussed are those which put workers in touch with consumers of the services provided but actually

control the payments to be paid to those who perform the services. The most notorious of them is Uber and its competitors in the transport, logistics, and food delivery industries. Uber provides a platform which connects people who need a ride, or consumers who need food delivered, with individuals who will do the driving (or riding if they are on bicycles or scooters). The consumer does not choose the worker; the worker does not choose the consumer. Drivers/deliverers register with the platform run by Uber, and, when Uber gets a request for a ride or a delivery, it contacts someone who is logged in to respond to do the task. Uber sets the prices for trips for workers and uses dispatch algorithms. Customer reviews of the services rendered are used by Uber to determine whether the drivers should remain on their books. Once again, while the drivers and deliverers do not have to work, they must, if they are making a substantial part of their income from these activities, turn their apps on and be ready to go where- and whenever they are told to go. A similar set of arrangements might involve restaurants which receive orders from a customer to have an order delivered. Uber Eats, or one of its competitors, then sends out one of its logged-on workers, who goes to the restaurant and delivers the ordered food and drinks. The restaurant pays the platform and it pays the deliverer. The drivers/deliverers do not get paid for the time while they wait for a passenger or delivery to be assigned to them; they may be disciplined for not doing things on time or if a consumer gives them a bad rating.

It is easier in these kinds of uses of digital technology to see the integrated nature of the relations, easier, that is, to see that this is a network designed to yield profits based on the labour power sold by workers. Accordingly, it is more difficult for the Ubers of this world to hold out that the workers are not employees, that they are independent contractors not entitled to minimum pay, overtime pay, pension benefits, unemployment benefits, severance pay, workers' compensation, and other such (costly) protections. The Ubers of this world are confronted by passionate arguments to treat these workers as if they were employees. They hit back.

The platform-mediated firms are aided by the seduction of the click and screen devices. People are taught to love their apps, the new innovations which allow them to satisfy their immediate wants. There is a reservoir of public sympathy for the innovators. This sentiment is supported by the implicit message that these innovations are part and parcel of a new and

better world, one in which all undesirable labour will be done by machines, leaving human beings free to pursue their desires. More concretely, the early development of these digital platforms was sold on the basis that they would help create nicer ways of living, of allowing us to live in sharing communities, getting closer to establishing a gift economy about which many idealists dream. The platforms were (and still are) branded as facilitators of what neighbours would like to do for each other: help out with a task, give a neighbour a lift, carry a heavy load for someone in need of assistance. The suggestion is that this is not work for wages that we are forced to do, but rather an agreeable way to satisfy our innate desire to help, to share. It is something many of us would choose to do if we were given the opportunity to do so. Platforms are benign assistants.

The idea that people drive for Uber and its like because they want to be good neighbours, or because they like the freedom of choice it gives them while earning some extra income, has become risible. All over the world these workers are rising up to protest their subjugations, their low incomes, their precariousness. It has become plain that these workers are not topping up their income, they are not indulging their desire to be useful to others. They need this work to survive and, all too often, it will not let them. In many jurisdictions, including the ones under discussion, these platform workers have gone to courts and other tribunals to claim that they should be entitled to some or all of the protections won by standard contract employees. And they have become increasingly successful. While adjudicators have not been all that receptive, legislators have stepped in to guarantee some employee-like protections to platform workers.

This is an ongoing struggle, underscoring the fact that platform workers see themselves as exploited by profit-seekers, that is, they see themselves as sellers of labour power to capitalists. Platform operators are fighting back and it is not clear how things will eventually come out, although, as noted, workers have had quite a number of wins. A few examples of these battles follow.

In March 2020, in Ontario, a labour relations board determined that drivers who used the Foodora platform should be classified as dependent contractors, not independent ones, as Foodora had designated them to be. This entitled the drivers to seek certification as a union and to bargain collectively. By late April 2020, Foodora, a Canadian subsidiary of a giant

German firm, Delivery Hero (which reports $2 billon in annual revenues), entered into bankruptcy proceedings. It agreed to disappear from the Ontario scene after reaching a compromise with some of its workers to pay them monies that were owed them. A similar scenario had unfolded in Australia in 2018, where Foodora had left Australia after its managers were compelled to concede that many of its workers were employees, rather than independent contractors, and should have been earning what the Australians call award wages. In France, it was determined in 2022 that Foodora had committed the offence of "concealed work," that is, not acknowledging that its deliverers were employees and should have received benefits due to them. Foodora recompensed some workers and fled. In California, in 2020, a court had determined that Uber and Lyft drivers were employees and should get the pay and benefits to which their direct equivalents, transportation workers, were entitled. In 2017, a New York court ruled that, in some circumstances, Uber drivers should be considered employees, entitling them to benefits not available to independent contractors. This was followed by a New York City Council ruling that it would limit transport licences, curtailing Uber's ability to expand as it had planned. In Australia, Uber had won a number of tribunal decisions that held that Uber had correctly characterized its service deliverers as independent contractors. But, in December 2020, the Federal Court of Australia showed itself very skeptical of this characterization as it heard a case brought by a driver for Uber Eats. She was claiming that she had been unfairly dismissed under the minimum standards covering employees. During the hearing, the judges gave Uber Eats a hard time. One judge observed that "we actually operate in the real world here. Judgments are practical thing, especially in this context. This is not a debating club." Another noted that "everybody knows what function Uber plays. The restaurant's function is to prepare the food. Uber's function is to deliver the food: isn't that right?" Before the Court could hand down its decision, Uber Eats settled the case. Plainly fearing a decision based on the Court's inclination to look at the economic reality, Uber did not want a judicially recorded pronouncement that would skewer its business model. In early 2021, Uber suffered an even greater blow when the highest court in the United Kingdom, in a case called *Uber BV and others* v. *Aslam and others*, held that Uber drivers were workers under its legislation and entitled to minimum standard protections. A Dutch court had

come to the same decision, and, in Spain, legislation was enacted to bring food deliverers into the category of couriers, a category covered by statutory protections. In the EU, a draft directive on platform work proposes to entitle all gig workers to protections available to other employees. If this directive becomes law, it will be enforceable in twenty-seven nations. It will, unlike the other developments, apply to all platform businesses, not just ride-share and food delivery.

Of course, it is not all plain sailing. The platform operators fight back. The most notorious instance is the successful overturning in 2023 of the California court decision that demanded that Uber and Lyft drivers be treated as employees. These corporations had funded a campaign to defeat a proposition on a ballot which would have converted the judicial decision into state-wide law. They had played up the desire of so many drivers to be independent, to be allowed to enjoy the flexibility that app work gave them. They obviously had support among the many consumers who liked the convenience of their services. Most surprisingly, they were also supported by many businesses that, for their own convenience and cost savings, rely on entering into single-instance contractual relationships. Many churches, synagogues, franchisors, cleaning service providers, real estate agents, and the like feared that to have Uber/Lyft contractors declared to be employees would lead to their own relationships with service renderers being characterized as costly employment ones.

In another instance, Uber, whose headquarters were then in The Netherlands, included a clause in its agreements with what it termed its independent contractors that, should there be a dispute, it should be resolved by a mediation/arbitration process in The Netherlands. This manifestly made it awkward for workers to get a legal remedy. When a class action in Ontario was lodged, demanding that local *Employment Standards Act* provisions be made applicable to Uber drivers, Uber asked that the case would have to wait until the international arbitration process had run its course. This position was successfully challenged by the claimants and, after some years, the class action is back in court. Uber has since moved its headquarters from The Netherlands (coincidentally?) after a Dutch court held it to be responsible for its contractors as if they were employees. Uber likes its early business model. It has been reported that it is now inserting a clause in its contracts that, if agreed to, will mean that

contractors will not participate in class actions. If they have a beef with Uber, they must bring their legal action as individuals.

As well as attacking adverse decisions directly, the platform-mediated work organizations have offered compromises which do accept some more of the costs of employing workers, without abandoning their business model. In one Australian example, Uber has announced that, concerned as it is about the welfare of its independent contractors, it will put a new gizmo, an object recognition facility, on its apps. This will enable Uber Eats to see whether its bike-riding deliverers are wearing a helmet, whether the bike looks roadworthy. The corporation will also provide bike lights, reflective vests, bells, and telephone holders. This, Uber Eats announced, merely reflected its concern (two bike-riding contractors had died in a three-day period). It was not an acknowledgement, declared Uber Eats, that the now-better-protected deliverers were employees. In a similar ploy, Uber, feeling the pressure, agreed with a union in Ontario that that union, while not becoming a certified bargaining agent for Uber's contractors, would be allowed to represent these contractors if they had a dispute with Uber, but only if the contractor chose to use the union in this way. And again, in Ontario, anticipating that the government was going to have to do something as the pressure to help out victimized platform workers was becoming politically unbearable, Uber offered a list of solutions of its own. It promised to provide certain employment-type benefits, while continuing to treat the workers as independent contractors. It seems to be Uber's version of friends (not relations) with benefits. It was astute as, at the time of writing, the Ministry of Labour is saying it will treat workers as employees when it comes to some entitlements, but not others, a halfway house, better than that proposed by Uber, but a halfway house nonetheless.

This kind of back and forth manoeuvring goes on ceaselessly. On the whole, it must be said that, in our parts of the world, the Uber, Lyft, and like platforms (as opposed to the first set of platform-mediated work discussed) are on the back foot. The workers' relative successes are attributable to a combination of factors.

As always, workers fight back when repressed. For instance: Uber sets fees that passengers are to pay and out of which drivers are to be paid on the basis of formulas linked to estimates of the time that should be taken to cover an assumed distance at a specific time of the day. In New York, it was

reported that drivers systematically would try to use longer routes. This guerilla-like response to what was felt to be a low-wage situation likely influenced the legislators who enacted New York's remedial legislation set out above. In another act of militance, in Australia, thousands of drivers logged off their apps simultaneously to pressure Uber to lift the rates of pay. These kinds of militant worker responses find unusual allies.

Most urban centres have regulated the taxicab businesses. They regulate taxis to avert ugly fights between taxicab owners, to ensure safety, and to provide reasonable conditions for non-owning drivers and a better deal for consumers. There are rules about fares, the right to refuse a passenger, the amount of luggage and number of passengers that may be carried; cars are inspected on a regular basis and those holding licences to operate a taxicab business are required to buy comprehensive commercial insurance. It costs a huge amount of money to set up a taxi business. Uber, Lyft, and their like have set up their business to avoid all of these requirements. They do not even have to buy the vehicles. They are thus a cheap alternative to a regulated business and destructive of cities' policies. Politicians not only point to the plight of established taxicab businesses, but they also complain about the increase in danger to passengers, the unwanted addition to traffic problems, and the worsening of air quality and noise. They are thus fortified in their push to rein in the Ubers, Lyfts, and the like, even as they continue to show themselves eager to claim that their regulatory efforts should not be deemed to be anti-private enterprise. They are aided, as they balance themselves delicately, by the fact that there are quite a few economists who are extremely critical of the business model used by these kinds of platform firms. Their concerns, while multi-faceted, circle around the fact that the platform industries do not conform to the developed capitalist relations of production which they assume to be the benign norm. In particular, they note the fact that platform operators such as Uber, Lyft, and their ilk are among the largest transport and logistic firms in the world, yet own few vehicles, or, similarly, that another kind of digital intermediary, Airbnb, is the largest rental/leasing accommodation firm around but owns very little property. To conventional economists, capitalists are owners of the means of production. The new modes feel alien to them. More, in cases such as Uber, the new arrivals are in a highly competitive market and that which makes them special, an app, is easily reproduced by new competitors. In

addition, they have to compete with well-entrenched private and public delivery services, such as FedEx and post offices and, of course, public transit. On the face of it, they ought not to prosper; it does not look like a promising business venture. This is underscored by the fact that, famously, Uber has failed to make any profit. Between 2017 and 2021, Uber recorded losses amounting to $27 billion. They should not be attracting much capital investment. If they do, something is awry and capitalism's ability to increase overall welfare may be hampered.

In this context, existing competing businesses and governments, eager to curb these new and disrupting platform operators, are happy to justify their desire to impose regulatory constraints on the platform-mediated work spheres by pointing to the plight of the exploited workers. In high dudgeon, they point to the fact that, in the quarter ending March 2021, Uber had booked a loss of $134 million, after paying its executives $349 million. The *Toronto Star*'s editorialists wrote in late 2020:

> These companies like to hide behind their apps, claiming they're a new and special kind of business, but we should not be fooled. What they're doing is to exploit loopholes to save money and that's an old game. It's something that low wage workers in areas from cleaning services and nail salons to construction and trucking have long faced…. It can't be left to a few companies who have landed on an exploitative business model to decide what the future of work looks like. That's a government responsibility and governments need to take it seriously—before it's too late.[3]

This analysis and sentiment go a long way toward explaining why there have been such successes as there have been in the platform-mediated spheres. It is rather paradoxical. When governments, thinking capitalists, and specific and established industries can see a danger to the status quo they favour, adjudicators and law-makers are much more ready to intervene with the cherished right of property owners to deploy their assets as they choose and to drop the usual insistence on finding a contract between individuals to establish the duties they owe each other. They are more willing to look at the way a business model actually functions, rather than

feel themselves bound by its legal form. They are more willing to look at the economic realities generated by the business model.

Does this tendency in the platform-mediated work sphere signify that denial of minimum entitlements will soon be a thing of the past in all other spheres? It is unlikely. The digital intermediary segment of the labour force is not all that large; it may just be a special setting attracting positive interventions. Only 8 to 10 percent of all workers are engaged in the so-called gig economy. In the huge majority of cases, the misclassification of workers, as worker advocates characterize the treatment of workers for remuneration whenever one of the many avoidance techniques used by employers is deployed, continues to play a significant role in the denial of legislated protections to millions of workers.

## SUMMATION

1. One of the least well kept secrets about capitalist relations of production is that one of the more efficient ways to maximize profits is to pass the costs of making profits on to others, to non-profiteers. The creation of externalities—that is, harms arising out of the search for profits and letting others bear those harms, say, particulates in the ambient air—leads to premature deaths and hurts for which profit-seeking capitalists are not made to pay. Capitalists are always pressuring governments to subsidize them to avert costs—tax breaks, free water, electricity, to pick up the costs of environmental clean-ups necessitated by profit-seeking activities, subsidies for research, protection for intellectual property—all reducing the costs of doing business.
2. The reduction of wages and the social wage are high on this agenda.
3. Somewhere near the end of the 18th and beginning of the 19th century, it came to be accepted that non-property owners were free to sell their talents and capacities to the owners of the means of production. Law was now enforcing contracts made between individual capitalists and workers. Law’s treatment of these contracts between economically unequal parties meant that the contract of employment came to be an effective means to extract surplus value. In effect, workers were paying with the hardships they endured for the profits made by their employers. Workers made enormous efforts to offset this built-in disadvantage. The contract came to

be adorned with a large number of protections that workers could not have won as individuals at the bargaining table. They used their numbers and their electoral rights to improve the social wage. Owners of the means of production had to find new ways to extract more value from workers.

4. The dominant class seeks to return to the good old times when a contract between a single capitalist and a single worker made for easy pickings. They rely on the fact that law made contracts for the sale and purchase of labour powers enforceable because workers were free to sell their capacities as they chose. The agenda is to take that principle and use legal technology and material technology to have work done for remuneration while pretending that there is no work-for-wages contract. They cleverly use legal technology devised to enable them to shift risks to this end. The creation of the corporation as an independent person, distinct from all other independent persons, allows them to force an employee to form a corporation which is to bid for the work formerly done by that employee and contract with it to have the same former employee do the same work but now no longer as an employee, averting the statutory obligations associated with a contract of employment. Or they can set up relations with other legally separate entities, say, a franchisee, whose operations they effectively control but which distances them, legally, that is, from the workers who actually do the work. Or they can use the new technologies to have production done by sovereign actors who, in fact, are totally dependent on the head firm—to exploit people and resources across the globe. The combination of these techniques has come together with the new digital platforms which deliver many services and have given rise to a workforce popularly referred to as gig workers. The name indicates that yet again a novel means of exploitation has emerged. Platform delivery of services makes it extremely difficult to find the formal legal trappings associated with the standard contract of employment. Needy workers are left to an unfettered market, the worst fate imaginable. This is one of the reasons why this kind of profit-seeking venture attracts so much attention, why it is so controversial: it is emblematic of the many ruses which are available to owners of the means of production to undermine the victories which workers had won by getting statutory relief based on the existence of an enforceable contract of employment.

5. The working class response speaks to its plight. Workers who once fought fiercely against the oppression they understood to inhere in the work-for-wages contract now are demanding that a work-for-wages relationship ought to be characterized as a contract of employment, attracting all the relief they had forced legislatures to attach to such formal contracts. They try to make those arguments within existing interpretations of contract law, and, when they do so, often founder as the old class enemies, the judges and the administrative tribunals which they influence, pretending to adhere to established principles, use their discretion to foil workers' arguments. This has forced workers to make another kind of argument. They claim that, precisely because they must work for wages, the decision-makers should simply determine whether the claimant workers had to do the work because they were in need and/or totally dependent on the person or entity for whom that work was being done.
6. Maybe there is a cause of optimism here. This argument may raise working class consciousness. It focuses on the basic difference in a class-divided political economy. By inference, one class has to argue that, despite liberalism's claim that all are equally sovereign, some are much more sovereign than others, which is what explains the precarity of so many lives.

PART IV

# *Manipulations by Law*

Wherein it is established that, despite protestations to the contrary, law is intent on providing the basic structural and ideological foundations for the maintenance and perpetuation of capitalism. Law steps in to help employers by implying terms and conditions into contracts of employment. The duties it imposes on employers are much less burdensome than those imposed on workers. Some workers who serve capitalists more directly are treated differently than the usually subjugated workers. Because of its pretensions to being liberal law which is to be applied even-handedly, law cannot, and does not, provide any satisfactory explanation for these differences in treatment.

CHAPTER 8

# *Helping employers out: A private sphere of criminal justice*

In early-19th-century England, a boss told his worker that, although it was his normal meal break, he should move a wagon. The worker refused. The dispute led to litigation. The judge, Lord Ellenborough, found in favour of the boss. He wrote:

> It would be hard upon the servant, but it would be exceedingly inconvenient if the servant were permitted to set himself up to control his master in his domestic regulations, such as the time of dinner … the question really comes to this, whether the master or the servant is to have the superior authority.[4]

The answer: the master.

## PROBLEMS EMPLOYERS NEED TO SOLVE

In previous chapters, the many advantages bestowed by law on the owners of the means of production have been emphasized. While workers in the more mature capitalist nation-states have made some inroads on some fronts, the basic structures and ideology which maintain and perpetuate capitalist relations of production remain in place.

There is no serious questioning of the sacrosanct nature of private ownership rights; we remain comfortable with the built-in inequality in ownership of the means of production. We do not doubt that the private accumulation of more wealth by private property owners in a competitive setting by means of the appropriation of socially produced value should continue to be our principal means by which to provide overall welfare. We

have not shaken off the notion that agreements between legally equal individuals should be enforced, even if they are agreements between economically very unequal individuals; we continue to assume that all legally equal individuals voluntarily enter into such unequal arrangements and that the terms and conditions to which they agree should be respected. All this makes the system of domination by the owners of the means of production viable. As Adam Smith wrote in his *Wealth of Nations*: “It is not … difficult to foresee which of the two parties must … force the other into compliance with their terms.” Yet, employers need even more help than the imbalanced starting points already provide.

Workers are needed. They must have the right training and attitudes. Markets for the goods and services produced by profit-seekers are needed. When workers are employed, employers must have means to ensure that they produce more value than they will receive by way of remuneration. Employers, in competition with others and unsure of the size and character of the potential market for their goods or services, are uncertain how to make their calculations and, therefore, how to assess the risks of any one investment. They are motivated to keep labour costs down as much as possible and need assistance to make these downward pushes effective.

As they face these built-in problems, capitalists are helped out. Law plays a vital role, instrumentally, structurally, and ideologically.

## ASSISTANCE TO EMPLOYERS

### *Provision of workers fit for the purpose and of consumers who can pay*

Human beings do not produce offspring to help employers enjoy the right number of properly trained workers and needed consumers. Governments, however, are able to influence parents, and they do so. The tools they use are not just geared to getting the right kind of labour markets; there may be other motivations, such as population control to lessen pressure on resources and capacities. Here China’s notorious, and now abandoned, criminally enforced one-child policy comes to mind. Sometimes, however, direct incentives to increase or diminish the birth rate may be consciously designed to shape the workforce. One incentive might be to give people a tax break, a child credit, or the like, if they produce more children. A recent Australian treasurer offered a monetary bonus to parents willing to have

(and to bring up) three children: “One for Mum, one for Dad, and one for the country” was his slogan. This budget policy came to be known among irreverent Australians as the bonking budget. Other benefits such as paid parental leave or cheap child care may be tried. Generally, enriching the social wage, particularly lowering the costs of good-quality education and health care (and, more recently, the promise of a cleaner environment), is, in part, intended to influence the rate of reproduction and, simultaneously, prepare the new workers to be flexible, putty that may be moulded more easily by employers as they strive to meet their goals.

Tax laws and social welfare legislation are tools which help manipulate the size of the workforce and, thereby, consumer markets. They do not do so as directly as do immigration laws. These are frequently linked to providing increases or decreases in the size of the workforce and to ensure that currently needed skills and talents become more readily available. In these many ways, law plays an instrumental role in giving life to policies aimed, directly and indirectly, at constructing useful and capitalist-friendly labour and consumer markets.

The employing class benefits enormously from passing on the costs both of reproduction and of the necessary nurturing and training of workers. The costs of labour are reduced in this manner and by other means. A level of vigorous competition among the produced, trained workers is assumed to be a worthwhile governmental policy goal. A corollary is that a level of unemployment which is not large enough to dampen consumption too much is far from unwelcome. Often, there is a collective shrugging of policy-makers’ shoulders when they are faced by what they term a natural level of unemployment. It turns out that the natural level of unemployment is a highly variable number; the concern about unemployment is less than grave-looking politicians suggest it is. And, on the other side of the coin, there often is a palpable sense of anxiety among the elites when there is a momentary dip in the number of people who are unemployed. As this is being written, the pandemic’s impact seems to have plateaued and the associated lower unemployment rate is causing concern. Canada’s Employment and Social Development agency has noted that this low unemployment rate is forcing the federal government to take action to help out Quebec’s employers confronted by a labour shortage. The obvious remedy, namely that employers attract workers by offering them better

deals, was not the first thought that came to mind. Helping employers pass on the costs of labour seems natural to governments.

*Legal promotion of a "taking": Labour produces, employers appropriate*

Capitalists hire workers to produce goods and services. Once produced, those goods and services are said to be owned by the employers. Now, the works of classical theorists on which so many of our modern capitalist defenders rely to justify the system ought to present them with a problem. John Locke defended the right for individuals to own property, entitling them to do with it as they like and to exclude all others from using it (the foundational rock of capitalism), by contending that it was a just reward for having done the work which had produced that property. Yet our contemporary legal system assumes that the tangible outcome of workers' efforts, that is, the workers' socially produced product, belongs not to them but to their employers. There is no obvious logic that underpins the assumption.

Robert Fischl tells of an interesting exercise in which he engages his labour law students. He asks them whether employers should be able to keep the product of the workers' efforts if the workers were willing to pay the employers for the use of the premises and any materials the employers supplied. He reports that his students never believe workers should be allowed to take home whatever they have produced in the workplace. When pressed for legal reasons, they fail to find any persuasive ones. Eventually, they will *assert* that, if workers could keep the product of their work, the system would not function.

The reason that the students come to this conclusion is that they understand that, if there is no appropriation by the employer of the value produced by workers, the relations of production will not be capitalist ones. This is what they mean when they assert that the system would not function. After all, what the system is all about is the extraction of surplus value, the taking of value produced by others. But this cannot be openly admitted: it would expose capitalism as a coercive, rapacious system. What happens is that another not-to-be-mentioned-aloud assumption is made, one which, if not contested, justifies the employers' appropriation of the product of their workers' efforts.

This assumption is that the labour power sold by workers is fully paid for by employers. If the workers are fully paid for the work they do, then any value left over after they have produced a good or service must be attributable to another person's contribution. This other person must be the employer who has contributed capital. Voila, problem solved. It is now logical to argue that it is perfectly normal and right for the employer to receive that value of the good or service. Note the fallout: the legalized right to claim ownership of workers' socially produced goods and services enables employers to treat those goods and services as commodities to be traded in competitive markets. There has been no taking from workers, there has been no appropriation of wealth produced by others. Inherent in this argument is a rejection of the Marxist reasoning which holds that what are seen as self-standing, separately created capital contributions—such as machinery, scientific processes and tools, inventions, and the like—are themselves products of labour power having been put to work. This rejection has enormous implications for the ways in which we see, and in which the law treats, work under capitalism. It goes a long way toward establishing the legitimacy, the acceptability of capitalist relations of production because

- there is no taking of property from producers;
- credibility is given to an argument that, as capital and labour power are distinct contributions provided by distinct parties seeking to benefit, the agreements into which they enter for their own benefit are voluntary; and
- the notion that contributions of capital and labour power are contributions of equal standing allows a pretense that both are taking comparable risks; this, as we shall see in chapter eleven, has profound (and adverse) impacts on the regulation of health and safety.

### *Work now, pay later: Keeping workers needy*

It is normal for workers to be paid in arrears. They must first fulfill their duties for a given period ere they get the wages which their contract promises them. The logic is straightforward: if they were paid in advance, workers might not perform their tasks or might perform them sloppily. As usual, this understanding is not challenged much, although, as matter of

logic, it easily could be. After all, might workers not have to worry about employers not paying up after they have performed their tasks for them? There are certainly enough instances of this to suggest that the claim that workers should be paid in advance makes some sense. Apparently not enough for it to be on the political or legal agenda.

Those who do not own any disposable wealth other than their labour power are put at an enormous disadvantage by the legally endorsed payment-in-arrears principle. As workers are paid in arrears, it is easier for employers to push their workers to do their utmost to perform the tasks as expected. As many workers have little by way of savings and cannot afford to be without paycheques for any length of time, the practice of paying in arrears adds to the pressure they feel to satisfy their employers, a pressure generated by the need to compete for jobs should they lose their current one. To emphasize how payment in arrears reinforces the power of employers, it is worth noting how, historically, employers have abused the power the practice gives them.

For the longest time, there was a common mode of payment which came to be known as “payment in truck.” An employer, instead of paying the agreed wages in cash, would offer employees goods in lieu of cash. Frequently, the workers could not get those goods anywhere but at the employer’s store or business. Overvaluation of the goods was common, eroding the wages. There were many variants of this malignant practice. Sometimes a voucher was given instead of cash; the voucher could only be redeemed at a specified tavern where the workers would have to go on payday. One story said this caused spouses to meet their partners at the tavern to stop them drinking away the week’s earnings. In coal mining towns in Wales, male workers used to hide their wives’ shoes on payday so that they would not be met by them at the mine, before they got to the tavern.

Once again, we see two things: employers will stoop to any stratagem to reduce their labour costs, and workers, all too often, start from behind the eight ball because law has normalized practices which suit employers.

Although these kinds of strategies aimed at diluting how much of the owed wages would be received by workers had thrived for a long time, they reached a crescendo when the 19th-century Industrial Revolution took hold. It led to a push for reforms. In 1831, the English legislature enacted the first

of many laws to stem these practices. It provided that workers should only be paid in coins, although a couple of minor deductions might be made. While it is not germane to this overview, it should be noted that the remedial legislation was torn to shreds by employers' successful appeals to their best friends, the judges. The judiciary read exceptions into the legislation, known as Truck Acts, allowing employers to make deductions from the promised wages for such things as the provision of fire, gas, power, and fines levied on workers for their lack of discipline, unpunctuality, and the like. This denotes that (a) employers remained eager to reduce their obligations to pay the solemnly agreed upon wages, and (b) the non-democratic legal functionaries felt that the law should be empathic to the employers, should enable them to use their economic advantage in these ways.

Today, as more workers have become unionized and as legislatures feel the need to redress some of the worst of the imbalances in capital-labour relations, it has been made much more difficult to abuse the persistence of the payment-in-arrears practice. Thus, in Canada, all provinces have inserted clauses in their employment standards statutes that say that the amount owed workers under the contract should be paid directly; albeit some exceptions—such as deductions for union dues or a pension scheme (typically the Canada Pension Plan or a registered retirement plan)—might be permitted.

In the end, payment in arrears remains a valuable, if not as draconic, tool for employers. While some of the abuses are now prevented, the principle helps employers in their efforts to keep workers hard at work.

## THE SINGULARITY OF THE CONTRACT OF EMPLOYMENT AND THE MAJOR UNRESOLVED EMPLOYERS' PROBLEM

As we have seen, the owners of the means of production have been given a great deal of assistance to get to what are now built-in advantages ere any negotiation with workers takes place. But they are still left with a major problem. It arises out of the singularity of the work-for-wages contract. It is not like any other contract.

What employers get when they offer workers remuneration in return for the rendering of services is a promise that workers will expend effort in performance of their tasks. They promise to use their intelligence, their

imagination, their physical abilities, their skill, their dexterity, their flexibility, their ability to focus. In short, in return for money, they offer employers the use of those traits which make them who they are, the things which make them the individuals they are, distinct from all other individuals. The harsh truth of what it means to live under a regime which requires those without any wealth other than their labour power to compete with each other as they seek to have owners of means of production employ them comes into full view.

Workers are competing, frequently begging, to enter into a contract in which they are expected to give up what they cherish. They are entering into a contract which, in the words of one of the doyens of Brtish labour lawyers, Otto Kahn-Freund, is a contract of *submission*. They will be told that, as they are doing this voluntarily, they have no cause to complain. Indeed, they should be grateful. Instinctively, workers sense this is not right, that it is not just or fair. They will resist. This is the nub of a serious problem for employers.

Employers, even with all their advantages when negotiating contracts of employment, cannot be sure how much of their intelligence, imagination, physical vigour, and skills and talents workers will expend when performing the tasks the employers need them to perform. Employers must find ways to get the most out of every worker.

Law offers a helping hand. It implies terms into contracts of employment, terms which are just as enforceable as any of the terms the parties have expressly negotiated.

If we took law’s pretenses seriously, implying terms into a contract negotiated between supposedly legally equal sovereign individuals ought to be done rarely, reluctantly. After all, such interventions appear to be externally imposed alterations to the explicitly expressed will of sovereign autonomous people. The legal justification is that it is right and proper to imply such terms as will enhance the efficacy of the contract and/or are necessary to make the intended agreement a viable one, and/or if the parties would have included them if they had thought about how to solve the problems they had not addressed. In short, they are justified if they would ensure that the contract will work as the contractors envisaged it would. But how do tribunals or courts determine what the parties would have wanted? Over time, a series of guesses have turned into rules. As it turns out, these

rules help employers resolve one of their main problems: how to get the most bang for their buck after purchasing an unquantified amount of labour power.

Before I get to the details of how this lucky break for employers is fashioned, it is pertinent to record that employers are also burdened by the judiciary's willingness to imply terms into contracts of employment. Any contract of employment has two parties and law, holding itself out as an objective enabler, imposes duties on both parties to make the contract what it assumes the parties want it to be. Employers and employees, both, are burdened by such implied duties. The duties imposed by law on employers do not inconvenience them in any fundamental way.

## DUTIES IMPOSED ON EMPLOYERS BY LAW: SOFTLY DOES IT, SAY THE COURTS

### *The duty to pay*

Even if the contract is silent on the matter, workers have to be paid. This is one obligation judges always have imposed on employers. Early in capitalist days, the courts were well aware of the wretched conditions of the working class and how quickly they would become destitute if there was a serious interruption with their stream of income. It was decided by the judiciary that employers had a duty to pay wages for as long as the workers remained willing to perform the work, even if they were unable to do so because of a temporary illness or incapacitation of some sort. If it became clear that the employers could not go on without replacing the missing workers or the inability to perform had become permanent, the obligation to pay wages ended. Today, there has been a turn away from these mildly worker supporting ideas. The commonly implied term is that, in the absence of a specific term or custom to the contrary, the duty to pay wages arises only when work is performed. This, of course, has forced workers to negotiate fiercely to win explicitly expressed terms providing for periods of paid sick leave or to struggle politically to have legislators impose terms on employers to provide specified periods of paid sick leave.

### *The very limited duty to provide work*

A similar dilution of duties imposed on employers is seen in respect of what was once the imposed obligation to provide work to employees. In 1906, in

a decision in a case called *Devonald* v. *Rosser & Sons*, the English Court of Appeal, afraid of delegitimating the voluntary contract ideology, acknowledged that employers could not suspend workers when a downturn in market conditions made it unprofitable for workers to continue to do their normal jobs. Employers either had to pay the workers or provide them with work; if they wanted to do neither, they simply would have to terminate the contracts in a lawful manner (which, usually, included having to pay them any wages owed and a payment of cash in lieu of reasonable notice under the contract). This suggested that there was something like a duty to provide work, but that duty never took hold. Today, workers are pleased to be suspended, rather than dismissed and being thrown back into the frightening competition for jobs. They rely on legislative provisions for replacement income, via government-designed unemployment benefit plans of one kind or another. In short, in contemporary labour law, there is no implied term which forces employers to provide work, not even to satisfy the workers' sense of fulfillment they might get from performing tasks. In an old English decision, a court wrote, "Provided I pay my cook her wages regularly she cannot complain if I choose to take any or all of my meals out."

### *The duty to indemnify workers and to provide honest references*

Employers are also saddled with another untroubling duty, the duty to indemnify workers for any expenses or costs incurred when carrying out their duties. It is sometimes said that employers are obliged to provide character references on behalf of their workers, but this is not a legal duty. If employers do supply a character reference, they will be given a qualified privilege should a defamation action be brought by an aggrieved worker.

Thus far, it is clear that the duties imposed on employers do not limit the employers' powers won at the negotiation tables in any serious way. Their starting advantage is not blunted.

### *The duty to provide a safe workplace*

More troubling, at least conceptually so, for employers is a judicially imposed duty to provide a safe workplace and a safe system of work. This duty is said to be non-delegable and it has clear implications for the ability

of employers to run their firms as they choose. Unsurprisingly, this imposition of a term adverse to the employing class came much later than the other duties noted above. Indeed, by the time the courts got around to crafting a duty to provide a safe work environment, a great deal of legislation to attain that end had already been enacted. The judiciary had come to be seen as being out of step with social developments. For years they had held that, as workers voluntarily came to work, they voluntarily agreed to the dangers of the workplace and to the danger of having to associate with careless or incompetent fellow employees who might cause them harm. Courts had gone out of their way to deny workers the right to sue their employers for harms inflicted. Legislators were called into action and Factories and Mining and, then, Construction Acts proliferated and imposed enforceable standards of care on employers and employees. A workers' compensation regime, which overcame the need to rely on difficult-to-mount legal actions to be looked after when hurt on the job, made the courts a secondary source of redress.

In sum, the judicially imposed employer-affecting duty of having to provide a safe workplace came late and played a relatively small role. The statutorily imposed scheme to provide replacement income and the enactment of a publicly enforceable set of minimum safety standards are, of course, much more of a fetter on managerial powers than any imposed by implying duties on employers which give workers a possible right to pursue their claims for damages as individuals. Consequently, the employing class fights fiercely about the scope of these statutorily imposed duties, often arguing for a return to the good old days when they were bound only by the contract of employment, including its judicially implied duties of care. Chapter eleven will focus directly on the nature of occupational health and safety regulation and the many legal and political struggles which surround it. For the moment, it suffices to make the point that, even though, notionally, the implied *contractual* term requiring employers to provide a safe workplace imposes employee-favouring and employer-burdening conditions, it pales into insignificance when compared to the impact of the modern legislative schemes which make minimum standards of behaviour binding, regardless of the parties' intentions, express or implied. They are a direct restraint on employer power.

### *The duty to maintain trust and confidence*

The kind of interplay between the rugged hands-off individualist approach and the more interventionist turn of legislators manifested in the health and safety sphere is a feature of legal gyrations. Recently such a back and forth has led to excitement in legal circles as it has led to what appears to be a novel imposition of a power-curbing duty on employers. I discuss these developments in some detail as they help me illustrate that, because of law's agenda to maintain the structural and ideological foundations of capitalism, these kinds of worker-favouring reforms are always limited.

The story begins in the UK, where some worker-friendly legislation was enacted which, in turn, as it had in the health and safety sphere, led to a judicial reformulation of its traditional approach. These worker-enhancing reforms coincided with the dilution of the scope of legislative and collectivist remedies, as austerity and less unionization became features of the overall picture. This UK development, thus far, has proved to be a bit of an aberration, one not welcomed in Canada and Australia, even though there, too, unions and the social wage had come under attack.

An Employment Appeals Tribunal (EAT) was established in the UK in the late 1970s. The intent was to give employees a more flexible way to get redress if they had been harmed by employer conduct. This is a good point at which to make an observation on what, in practice, it means for employees to be able to point to employers' breaches of express and implied terms of contracts of employment. They are entitled to sue for damages in court. For the longest time, these damages were limited to the amount of money they would have been paid if they had been given notice of termination and worked for that period. That is all. If they had lost their jobs, there was no way for them to be reinstated. As these kinds of contracts are contracts for personal service, judges reasoned that to force a party to carry out promises to perform would amount to forcing one autonomous individual to work with another with whom they did not want any personal relations. The judicial insistence on the legal and political equality of the parties to the contract would not let them support that kind of result. In judicially made contract-of-employment law, the remedy of specific performance is not available.

Given the costs of going to court and the relatively minor return that could be expected in most successful cases, the judicial forum did not offer much to workers confronted by contract-breaching employers. This is why tribunals such as the EAT (and comparable, but not identical, mechanisms of resolution in like jurisdictions) were born. They offered much less costly and more flexible remedies to aggrieved workers. The courts were being marginalized.

Recently, presumably to re-establish their waning prestige and authority, courts have overruled their own centuries-old rule (authoritatively proclaimed by the House of Lords in *Addis* v. *Gramophone Co. Ltd.* in 1909) that breaches of contracts of employment did not allow punitive damages to be paid to successful plaintiffs. It now has become acceptable for courts to award damages for the mental distress suffered by a dismissed employee, provided that the distress exceeds that which could reasonably be expected to accompany a wrongful dismissal. Sometimes an amount is just added to the award of pay in lieu of notice; sometimes it is seen as a separate lump sum awarded for a distinct injury caused by the wrongful employer conduct. Usually, what the courts are looking for is a lack of honest dealing with the employee, a public humiliation or deliberately offering a notice period before termination which employers are aware is well below that which should be offered; in short, the courts assess whether employers have acted in bad faith. This approach has opened the door for the award of a separate basis for damages: punitive damages. The stated goal is to deter the defendant employer and all other employers out there from engaging in such nasty behaviour.

While these novel judicial remedies go some way to offset the bad reputation the judiciary had earned as a forum for workers' relief, it remains true that it costs a great deal of money to go to court, a matter of concern for those who need a remedy sooner rather than later. More, a finding that mental distress was caused by being lied to, or being humiliated, or being left out of decision-making loops is unlikely to be made in the bulk of cases in which workers have suffered such hurts. For the most part, these judicial remedies are of most use to high-level, high-status, high-earning employees. For most workers, tribunals and mechanisms such as the EAT remain better venues. It is in this context that the UK took a large step by

lending its support to the imposition of an apparently novel duty on employers.

In the frequently discussed 1997 decision *Malik* v. *Bank of Credit and Commerce International SA (in liq).*, the House of Lords built on jurisprudence developed by the legislatively created EAT. That tribunal had provided relief to workers who claimed that they had been dismissed by their employer, although their employer had not formally terminated the contract either by giving notice or because it had claimed to have had cause to do so. The workers alleged that they had been treated in a way that society no longer tolerated: they had been bullied, verbally abused, sexually abused, subjected to allegations of dishonesty, or their performance had not been assessed fairly or honestly. The tribunal scheme allowed them to seek a remedy on the basis that their employer had repudiated a fundamental term of the contract because it was now impossible to perform the contract according to its terms and intentions. The workers argued that the employer conduct amounted to a constructive dismissal and they were entitled to a remedy. It was, in essence, a claim that workers should be entitled to a remedy because the employer conduct amounted to unfairness.

Initially, the judiciary did not think it was an advance on the existing common law. They were of the view that it had been the law that, should one party engage in conduct which showed that it did not feel itself bound to honour one of the essential terms of the contract, the other party had always been free to accept this repudiation of the contract and sue for the losses suffered as a result of its termination. All that was happening was that there was a new consciousness about what might constitute repudiatory conduct. Because of the language used by the tribunal, academics and some judges began to describe what was going on as a recognition that parties to a contract of employment had a duty to avoid conduct which posed a threat to the relationship of confidence and trust they had established by entering into the contract. These linguistic formulations, inspired by the EAT's obvious desire to show it was a new broom sweeping clean, might not have had much significance until the House of Lords appeared to give the formulation a standing of its own as a term to be implied in all contracts of employment.

In *Malik*, a bank had engaged in fraudulent conduct vis-à-vis other businesses. Before this became known, two employees had been made

redundant by the bank. They brought actions against the bank claiming that, while they had not known of the bad conduct when they were employed and while it was not aimed at them, they were now suffering emotional pain and stigma and that their opportunities for new employment had been adversely affected. The House of Lords held that, while it had only been used when employees had been targeted by wilful employers, there was an implied duty of mutual trust and confidence and it was generous enough to apply to the very special circumstances before it. It is easy to see why the decision created a great deal of excitement: a senior court had held that the tradition of the light touch when it came to imposing implied contractual duties on employers was to be abandoned. How significant was this likely to be?

To begin, it has to be noted that there is nothing in the *Malik* formulation which restricts it to special kinds of employment contracts, but it would be foolish to disregard the context in which the House of Lords made its decision. The employees were high flyers. They had occupied middle to high managerial status. More, they were paid handsomely, very handsomely. While they are not the only kind of people who feel profound pain when they lose their jobs, their claim is much more likely to sound credible to a judiciary sympathetic to the lot of professionals just like them. Anecdotally, note how individuals with prestigious standings are punished less harshly than mere working class ones when crimes are committed because the sentencing judges believe that, their dirty laundry having been aired publicly, the prestigious and well-paid defendants have suffered a great deal already. Given this elitist sensibility, given the costs and uncertainties of litigation and the possibility that their feelings of despair will not be treated all that generously, the much larger number of lesser-status workers who feel hurt are unlikely to avail themselves of the pronouncements about the wide-sweeping nature of novel duty proclaimed by the UK superior courts. This is all the more likely to be true because of another feature of the *Malik* decision.

While the House of Lords waxed lyrically about the need to acknowledge that bad employer conduct may be a breach of this judicially imposed duty of mutual trust and confidence, the judges were not all that confident about its breadth. They wrote that it was normal for employees to feel aggrieved, spiritually injured, when they lost their positions, their income, their security, the source of pride which made them feel good, but

that this did not mean that employer behaviour which led to these outcomes was necessarily actionable. They emphasized that the bank in the *Malik* case had engaged in flagrant deception, had shown itself heedless of society's norms and expectations. Lord Nicholls pointed out that like circumstances would not present themselves very often in contract-of-employment cases. As will be seen, there was a logic pushing their Lordships to offer these kinds of caveats, caveats that suggested that they did not want the newfangled duty to get out of hand. Not all that many workers should hope to get the benefit of the implied duty of mutual trust and confidence.

Not too surprisingly, courts in other jurisdictions (which normally pay the highest respect to the highest court of a land which, in its imperial days, had given them the law which they now administer) have been cagey about how much support they will give to the *Malik* pronouncements. In *Matthews* v. *Ocean Nutrition Canada Ltd.* (2020), the Supreme Court of Canada was in a position to address the issue as to whether or not Canadian courts should impose the implied duty formulated in *Malik*. It denied itself the opportunity to do so, deciding the case before it in favour of the employee while deliberately not relying on the *Malik* doctrine.

In *Matthews*, the question was whether a former employee, Matthews, was entitled to get the benefits of a Long-Term Incentive Plan (LTIP) which had been designed to retain valuable employees. The benefits were to be paid upon a triggering event, the sale of the firm being one such event. As it happened, Matthews was no longer an employee when a sale was engineered. He made his claim to entitlement on the basis that he would still have been an employee if the employer had not behaved so badly toward him. The evidence was overwhelming. Matthews was a very skilled chemist who had held a number of senior positions in the firm. His career with the firm became troublesome when a new chief operating officer made his life a misery by excluding him from managerial meetings, reviewing his performance, and not allowing him to participate in discussions about the potential sale of the firm, that is, he was made to feel marginalized and insecure. Eventually he resigned. In short, he was now claiming that he had been constructively dismissed and that, but for that, he would have participated in the benefits of the LTIP.

On the face of it, he had a stronger case than Malik had had when he'd succeeded in his claim that his employer had breached the implied duty of mutual trust and confidence. The bad-faith, malignant behaviour which had made Matthews's employment contract non-viable and which had caused him much distress had been tailored to have precisely those impacts. Instead of saying that it would apply the *Malik* doctrine to the case before it, the Supreme Court decided the case in Matthews's favour by reading the terms of the LTIP as ambiguous enough to permit the benefits it offered to be awarded even though, in formal terms, it seemed that they were meant to benefit employees who had been retained until the firm was sold. The result was obtained not only by sidestepping the implications for Canada of the UK line of cases, but also without pronouncing on an analogous argument before the Court which advocated the imposition of a duty of good faith in contractual relationships over and above the duty to be honest (a duty established in an earlier 2014 case called *Bhasin* v. *Hrynew*, which was described as a decision adding little, tinkering at the edges, as it were). In *Matthews*, the Supreme Court of Canada did not go beyond an affirmation of the duty to act fairly when employers intended to terminate a contract of employment.

The trouble the highest court in Canada went to in order to avoid discussing the issue of a demanding employer duty is eye-catching. Rather than expand the scope of a novel implied term of mutual trust and confidence, it opted for soft language about fairness in contract-making and implementation. There has to be an explanation for this judicial reluctance. Let me come to it but, first, let it be noted, once again, that for most workers the issues are more abstract than useful. Matthews, the successful plaintiff, was awarded over $1 million in damages, a sum worth risk-taking by a disgruntled and badly treated employee; hardly the normal case in which workers face capricious employers or worse.

This factor, the general inutility of these novel remedies, also surfaced in Australia's highest court's rejection of the imposition of an implied duty of mutual trust and confidence. The case was called *Commonwealth Bank of Australia* v. *Barker* (2014). Once again, the employer had been high-handed. In making the employee redundant, it had exhibited both incompetence and a clear reluctance to abide by well-established policies it had created and which employees believed were part of the arrangements

they had with the bank, even if, in formal terms, they were not part of the contract. Once again, the employee who sought relief on the basis that this was a breach of an implied duty, one of mutual trust and confidence, was a high flyer, rather than a shopfloor worker, retail clerk, truck driver, or coal miner. He was an executive manager. And, once again, the judges refused to adopt the UK approach. As, on the face of it, the case fitted within the four corners of the *Malik* doctrine, the High Court of Australia had to resort to legal finesse to avoid it. This time the method used was to distinguish the UK position from the Australian one by pointing to the fact that the UK decision sprang out of the legal need for the doctrine so that workers could bring themselves under the umbrella of the EAT, the legislative tribunal which could provide remedies more easily and effectively. There was no equivalent need in Australia and, therefore, no pressure to follow suit. In addition, the judges actually articulated why they did not want to jump aboard the UK boat and its novel implied employer duty.

The majority in the Australian High Court explicitly stated that the imposition of an implied term of mutual trust and confidence would impose greater obligations than could be justified. It would affect the residual right employers have traditionally enjoyed to run their businesses as they choose. To rein in employers in this way would be for the judiciary to go beyond the "legitimate law-making functions of the courts." Any such major shifts should be left to the legislature. The Supreme Court of Canada evinced a similar approach in *Bashin* v.*Hrynew*. It wrote that any implied term requiring good faith normally did not amount to much more than a requirement that both parties should be honest, forthright, and reasonable in contractual performance. Some special circumstances might require more, but good faith in a contract of employment is always going to be less demanding than the duties owed by a person owing fiduciary duties. Those kinds of duties prescribe that the person owing them must put the interests of the intended beneficiaries first. In an employment contract, a contract between notionally equally self-serving sovereign parties (regardless of their unequal economic starting points), this makes no sense. The message is blunt and clear.

Whatever implying a good faith term might denote, it should always be read so as to allow private ordering (that is, the right of people to determine how to deploy their assets) to hold sway; courts should not be in the

business of undermining certainty and autonomy in commercial affairs. In sum, the power of management might be modified by demands of fairness in treatment, but there was a limit: employers should not be thwarted as they strove for profits in ways they thought appropriate. This also undergirded the decision in *Matthews* v. *Ocean Nutrition Canada* and, indeed, was also a matter of concern to the House of Lords in *Malik* itself. There Lord Steyn wrote that the implied duty of mutual trust and confidence he was advocating had to be carefully applied because "as formulated it [was] apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly treated."

Despite the judiciary's willingness to demand that employers act honestly and fairly when making decisions of great importance to employees, for most people working under contracts of employment, the courts' views of employer obligations do not serve them all that well. There has been some movement toward crafting a more onerous duty which, largely—and to the extent it exists—will be of use to high-status and well-paid employees. In the end, judicial law—as always—is not very hard on employers. This is not true when it comes to imposing implied terms on employees.

## DUTIES IMPOSED ON EMPLOYEES BY LAW: DO NOT SPARE THE ROD, SAY THE COURTS (AND ARBITRATORS)

As seen, then, the courts are solicitous of the employers' need to be able to use their wealth as they see fit. This is not where their generosity toward the employing class stops. They do their utmost to help those already-favoured employers as they confront the problem on how to get the most out of every worker whose labour capacity they have purchased. This is what capitalist logic dictates. The judiciary has taken up the cudgel on capitalists' behalf and has crafted burdensome duties which they impose on workers, burdens which appear to have become ideologically unassailable. No matter under which regime of legal regulation workers find themselves—by individual contracts of employment governed solely by common law courts, or by individual contracts of employment governed by both courts and administrative tribunals, or by the courts and mechanisms of governance

established by means of collective bargaining—the implied terms designed by the courts to serve capital are imposed on every single worker.

At a minimum, all workers have a duty to act in good faith and to be loyal to their employer; all have a duty to exercise reasonable care and skill as they perform their tasks; all have a duty to obey the lawful commands of their employer. It requires no deep analysis to see what these implied terms are intended to achieve: they will enable employers to push workers to expend more of their intelligence, their physical strength and dexterity, their imagination and ability to improvise. These *legally implied* employee duties directly help employers overcome one of their problems: how to turn more of the raw labour capacities they have bought into labour which produces saleable value for them. Or, from a workers' perspective, they make it harder for workers to withhold from employers as much as possible of what is precious to them, namely, the traits and characteristics which make them the individuals they are. Here an important legal aspect of the imposition of these implied terms needs to be stressed.

A breach of one of these implied terms gives employers a right to sue the violating worker. This corresponds to the right workers have when an employer breaches one of its implied terms of the contract. But in practice, the outcome is dramatically different. The right to sue mostly impecunious workers does not mean very much: the harm to employers is usually materially insignificant and, in any event, most workers do not have the funds to compensate employers should large losses be incurred by an employer. But employers have other remedies than the right to sue for damages in a civil court. They may claim that the breach by workers of an implied term is a repudiation of an essential term of the contract which allows them to terminate the contract. They will have the right to sack such a worker because they have *just cause* to do so. Self-evidently, the rights which accrue when employers complain about a breach of a term of the contract of employment are more impactful than those given to workers when employers violate the contractual terms. Employers can throw workers back into the competitive markets, putting their livelihoods, their families' and their own security at risk. This possibility gives employers a big stick to wield as they seek to extract as much effort out of each worker as possible.

Earlier in this chapter, reference was made to Kahn-Freund's statement that, in its inception, the contract of employment is one of submission because workers have no real economic choice: they must enter into a contractual relationship with owners of the means of production. Kahn-Freund followed that thought with another. He went on to say that the contract of submission was also a contract of subordination. The above list of imposed implied terms and conditions and the consequences of breach are indicia of this subordination.

### *The duty of good faith and loyalty*

**Trade secrets:** Workers' duty to be of good faith and to show loyalty to their employers reads benignly enough. It seems to suggest that there is a duty to be co-operative. It works out differently. The duty has been interpreted to reinforce a major criterion of the work-for-wages contract: it underwrites the proposition that the product of workers' efforts becomes the property of the employers. One manifestation of how this works is the way in which the judges and administrators deal with what are called trade secrets.

It is inevitable that workers get to know how their employers operate. They may come to learn of a formula, of the use of a specific material, or of a list of clients or a unique process. They may not take any of that information away and put it to use for a competitor or for themselves. The knowledge does not belong to them, even though they may have played a pivotal part in developing it. Even if they invent something new, something which the employer had never heard of and which has the potential to deliver profits, the invention will belong to the employer. This will only not be the case if the nature of the contract is of such a kind that the employer should not expect to be able to make such a claim. It may well be the case that an invention made by employees in their own time, and without any explicit obligation to spend time inventing, may be claimed by employers who argue successfully that the surrounding circumstances—such as when and where the invention was mostly developed, whose materials were used, and the level of employment inventing workers occupied—may give rise to the conclusion that the employers have a valid claim to the fruit of their workers' labour and imagination. In short, workers not only have to sell

some of the traits which make them individuals, but the implied duty of good faith and loyalty also exaggerates the sense of alienation they feel as their contributions to the production of goods and services are ripped away from them.

**Limitations on lifestyle:** The duty of good faith and loyalty, demanding, as it does, that workers put their employers' interests first, their own second, also allows employers to complain that the workers' conduct outside working hours and outside the workplace might harm the image of the firms for which they work. Their conduct may well amount to a violation of the duty of good faith and loyalty, giving rise to the right of employers to sue or punish the wayward workers by terminating their employment for cause. This underscores how much control over their lives workers give up when they sell their labour power.

**Whistleblowers:** This control over workers which employers have as a result of buying workers' labour power is reflected in what happens when workers believe that the way in which their employers run their businesses is dangerous or harmful to workers and other people. The duty of good faith and loyalty works to inhibit the free speech rights supposedly guaranteed to all individuals. The duty is wide enough to protect confidential information (which lies at the root of the protection of trade secrets), a restriction that makes it so very difficult for people whose conscience drives them to disclose employer conduct which they perceive to be wrongful. Whistleblowing, which might well serve the public interest, is seriously constrained by the judicially created starting point, namely, that the employees' duty to be of good faith and fidelity is there to safeguard managerial prerogatives. Workers' rights and the public interest are subordinated to the legally supported employers' freedom to do with their property as they choose. It is a rather amazing starting point in a self-declared liberal polity.

*The duty to exercise reasonable skill and care*

The duty imposed on workers to exercise skill and care is less obviously authoritarian. It makes some sense; as commentators have documented,

many workers, once they have a job, would like to do it well. It is thus not an implied duty which, these days, gives employers another stick to beat workers with. But it did so in the early days of capitalism.

Courts took their cue from the Master and Servant Acts, which demanded that every whim of a master should be satisfied and allowed employers to dismiss workers without notice if they felt that the workers had performed poorly. Gradually, as both the scale and sophistication of the modes of production changed, it became evident that most employers were nowhere as cognizant as workers when it came to discerning what skills and care should be exercised to discharge tasks effectively. It became silly to hold fast to a rule which responded reflexively to an employer's demand that a particular level of skill had to be exercised. The evolved rule appears to be that employers are entitled to expect that workers live up to what is deemed among their peers to be a reasonable level of skill and care. More, deviance from that level is not likely to be seen as just cause for dismissal unless it is accompanied by a bad attitude, by a wilful refusal by workers to do their best.

In short, this aspect of the imposition of implied duties on employees is not anywhere as employer-favouring as other such duties.

### *The duty to obey*

The duty to obey is the most effective one in the employers' armoury. Initially, as feudalism faded, the courts were reluctant to abandon the imperious sway feudal barons could exercise over their inferiors. As the common law courts imposed the implied duty to obey into contracts of employment, they would rule that any act of disobedience, no matter why it occurred, gave employers just cause to dismiss their employees. In one notorious case, a domestic servant whose mistress had refused her request that she be allowed to visit her desperately ill mother went to see her anyway. The servant was dismissed by her mistress, a dismissal that was legally justified, a court said. Over time, the courts have become less inflexible. They acknowledge that workers cannot be asked to obey orders which are plainly unlawful—say, an order that is in violation of an existing law or regulation or asks workers to put their lives or physical security in danger. Workers may be entitled to disobey an order to do a task which, it is

clear, the contract never envisaged they should perform. Even if the contractual circumstances are a little ambiguous about what the scope of workers' duties might be, disobedience will not give employers just cause if workers honestly and reasonably believed that the order was not a proper one. Of course, this leaves a lot of slippage. Thus, if an employer changes aspects of the production processes and demands that workers take on new tasks or work in different ways or even different hours or days, it is hard for workers to know whether they can safely disobey such commands. The fear of guessing wrong gives employers a powerful tool to run the firm as they see fit, that is, to get more out of workers than workers thought they had promised to give.

In one well-known case in the 1950s, *Laws* v. *London Chronicle*, it was held that a junior employee had been taken to a meeting by her immediate manager. This man got into a fight with his managers at that meeting and walked out, asking his junior to accompany him. The junior employee went with him, although she was asked to stay. While the court emphasized that she had done the wrong thing, it was solicitous of the young woman, who was patronizingly described as having been a good girl until the pivotal moment. She had been caught between a rock and a hard place—conflicting orders by two sets of people both entitled to give her orders. Her disobedience was not one which allowed the employer to dismiss her. This informs the current state of the law. It seems that disobedience might have to be accompanied by some other factor, such as insolence, lack of loyalty, unacceptable lack of courtesy, or the like, in order for it to become a just cause for summary dismissal. This extra dimension might temper the power of employers a little, but it should be noted that it remains true that (a) one act of disobedience may be sufficient to allow an employer to treat it as a repudiation of the contract if accompanied by a certain amount of surliness, of rebelliousness, of insolence; and (b) there rarely being all that much certainty about what the scope of lawful employer orders might be, workers find it difficult to assert themselves. Just to offer one example: a woman serving as a secretary and whose prescribed tasks included looking after appointments, taking shorthand and machine dictation, typing and handling correspondence, maintaining confidential files, and the like, was asked by her immediate boss to serve coffee. She refused. It was decided that, inasmuch as her boss wanted the coffee for himself, she was entitled to

disobey his command, but not so if he was holding a meeting. While drawing this kind of line may seem easy when the issues are finally litigated, it manifestly is not when there is some kind of conflict during normal operations. Given the cost of having their disobedience eventually validated, workers are likely to err on the side of caution, to repress their impulse to stand up for themselves. It is safer to do as they are asked to do, even if they feel they demand is not a proper one. From the employers' point of view, this is just what the doctor ordered.

## ALTERNATIVE DISPUTE RESOLUTION

At their core, these implied duties imposed on workers, while not as draconian as they were in their inception, continue to validate a hierarchical relationship between employers and their employees. They are based on the premise that an employment relationship is one which establishes a nexus between legally superior and legally inferior individuals. And this notion, this embedded belief that it is right for one person to a supposedly voluntarily entered into contract to lord it over the other persists, even when legislatures, responding to workers' agitation for relief, have created a dispute resolution mechanism other than the common law courts which crafted the implied imposed terms and conditions.

All the jurisdictions looked to in this book have established both administrative tribunals and private mechanisms of dispute resolution designed to deal with unfair and unjust dismissal. This was noted during the discussion above which observed that some jurisdictions relied on their distinct legislative schemes to reject the UK movement toward the establishment of a duty of mutual trust and confidence. In large part, these alternate means of dispute settlement were developed because it was plain that forcing workers to rely on the traditionally unsympathetic and costly courts for redress led to unsatisfactory outcomes. All the more so because relief in the courts was limited in nature. Damages were all an aggrieved worker could expect. The new mechanisms are much more flexible. Yet, despite their claim to be more flexible, more open to meeting the needs of workers, the newfangled mechanisms of adjustment respect the core of the judiciary's approach: they have internalized the view that the implied duties imposed on employees, as crafted by the common law courts, are integral to every contract of employment. Here the discussion will focus on the system

which I know best, the grievance arbitration system embedded in the US and Canadian collective bargaining regimes.

In the North American collective bargaining schemes, the emphasis is on voluntariness, just as it is in individual contract-making. Here, however, the claim that the ensuing terms and conditions have been agreed upon voluntarily has much more credibility. After all, it is called collective bargaining because the workers have been allowed to negotiate as a collective and, in certain circumstances, to *legally* use their collective economic power to win the terms and conditions they seek. This is a major concession workers have won over time. One of the trade-offs is that they may not use their power to withhold labour in concert once a collective agreement has been concluded and during the period of its life. Any disputes which arise as to the meaning, width, application, and interpretation of the terms and conditions are to be subjected to a quasi-judicial dispute resolution scheme, grievance arbitration.

When there is a dispute during the life of the collective agreement, the parties to the agreement, the employer and the union (not individual workers), go through a series of meetings and steps to resolve the problem. If they are unable to do so, the question is handed over to a grievance arbitrator. The arbitrators gather the evidence and have the task of interpreting the issues from within the framework of the collective agreement. The notion is that that agreement has a spirit and set of understandings voluntarily reached by the parties and that these aspects must be honoured by arbitrators. Over time and after thousands of arbitrations, a jurisprudence has evolved as to how the many recurring disputes ought to be resolved. While a dispute is being resolved, the parties are to continue to work with each other as required by their collective agreement. The price for arbitration not only requires workers to give up the weapon which got them the agreement in the first place, namely their right to withhold labour, but to continue to work as if there is nothing wrong with the way in which the agreement is working. This principle was laid down with some vigour in *Ford Motors*, an arbitration decision which arose in the early development of modern grievance arbitration (1948) by Arbitrator Shulman:

> An industrial plant is not a debating society. Its object is production. When a controversy arises, production cannot wait for the exhaustion of the grievance procedure … production must go on. And someone must have the authority to direct the manner in which it is to go on until the controversy is settled. The authority is vested in supervision. It must be vested there because the responsibility for production is also vested there; and responsibility must be accompanied by authority. It is fairly vested there because the grievance procedure is capable of adequately recompensing employees for abuse of authority by supervision.

Well over a century after *Spain* v. *Arnott*, the 1817 decision quoted at the beginning of this chapter, the spirit evinced by Lord Ellenborough still rules. Hierarchy, with capitalists being on the top rung of the hierarchical ladder, workers on its bottom rung, remains the preferred and privileged mode of production. True to the notions that the employers' needs must be met and that employers are to be in command, the mantra of 21st-century grievance arbitration is "Obey now, grieve later." The new, more worker friendly capital-labour regime clings to old ideas. This is not to say that nothing has changed.

Grievance arbitrators have the power to fashion remedies which will allow for compromises between antagonistic employers and workers, and which will promote the dynamism and efficacy of the collective agreement whose terms are in dispute. This differentiates them from common law courts, where damages may be awarded but giving the job back to a vindicated worker is out of the question. As grievance arbitrators began to carve out their jurisprudence, they fashioned a whole lot of other remedies (including reinstatement), aimed at forcing employers and employees to live together and within the spirit of the negotiated collective agreement. On its face, this was a big step forward for workers, as now not every proved breach of an explicit or implied duty could lead to them being thrown back into the surplus workforce where they would have to compete for scarce jobs. As well, a significant collateral benefit for workers was that the arbitral scheme came to require employers to follow certain protocols before they acted on their desire to hold a worker to account. Arbitrators taught employers that they had to abide by a series of procedures ere they

took action against workers. Over time, employers have learned to rein in their more tyrannical instincts. But all that glitters is not gold.

As noted, while arbitrators (and analogous administrators of tribunals legislatively created in New Zealand, Australia, and the UK) see themselves as more in tune with modern capital-labour relations and to be much more flexible than the judiciary, it turns out that, just like the disparaged judges, they believe that the conceptual bases which led to the imposition of implied duties on workers by those judges are still sound and to be respected. The following have been declared to be breaches which should allow employers to discipline workers: failure to notify an employer of absence from work, absence from work due to incarceration, abuse of leave of absence, drinking, conflicts of interest, failure to explain criminal charges, damage to employers' property, failure to disclose the misconduct of others, failure to get along with fellow workers, fighting with others, threatening others, falsification of records, insolent behaviour, use of abusive and obscene language, lateness, leaving work without permission, off-duty work conduct (sometimes involving criminal conduct, sometimes not), and unacceptable work performance. In short, violations which are carefully worked out refinements of the classic judicially imposed duties to obey, to exercise reasonable skill, and to act in good faith and with loyalty have been acknowledged to be valid bases for the exercise of managerial control over employees represented by unions. Unions, as parties to the agreements, have accepted the right of employers to insist that workers abide by these duties. Unions that fight the way in which employers are trying to force a worker to behave are questioning a particular application of the general principle, but not the employers' inherent right to have workers obey, exercise reasonable skill, show good faith, and exhibit loyalty. Even as employers are being constrained, their *legal* right to get as much value out of each worker's capacity to provide it is enhanced. The very inventiveness of arbitrators as they fashion remedies never countenanced by the judiciary has served the employing class very well.

Once an arbitrator has determined that there has been a violation by a worker, the worker may merely be reprimanded, or suspended without pay for varying periods (which might make for a hefty monetary fine), forced to apologize, forced to accept entry into a re-education program (for example, anger management, or alcohol or drug rehabilitation), or be dismissed (as a

court might have done); a dismissal may well be the consequence of a worker having fallen foul of decent behaviour in the past and the latest violation of a duty is taken to prove that they are beyond repair, beyond saving. It is a culminating incident warranting the ultimate penalty.

And there we have it: the language, the language of punishment, reveals what the goals of arbitrators are as they craft and apply a wide variety of remedies when dealing with workers who have, in some way, violated an explicit or imposed duty. They, like the courts before them, put a check on worker freedoms.

The arbitrators' goals are: specific deterrence (of each violator of one of the fundamental duties crafted so long ago by the judges); general deterrence, so that all workers will see what is expected of them; and corrective justice, so as to improve the attitudes and malleability of their workers. It is not hard to see how these drivers of grievance arbitration serve employers as a class, even as their absolute powers have been constrained. Workers are continuously taught, by the arbitrators and by their unions, which fight for alleviation of the penalties exacted by employers without rejecting their right to sanction workers, that, unless workers discharge both their explicitly spelled out and implied duties, employers have a right to discipline them. Employers are assisted by arbitrators, legally sanctioned functionaries, in the creation of a work culture that suits them, that helps them as they try to exact as much labour as possible out of the undefined amount of labour capacity they have bought.

Put in this way, what emerges is an intriguing parallel between State power and the coercive power permissibly exercised by employers in the private ordering sphere. In a liberal polity, the State is to be the only wielder of coercive power. It is to do so carefully, so as not to abrogate the autonomy of individuals unnecessarily, a balancing act that gives rise to much controversy. But the idea is clear: coercion is generally unacceptable and, while the State must be equipped with the ability to use force to maintain and perpetuate the status quo, it, too, should be restrained. What we find in the capital-labour relations sphere is an analogously finely calibrated *punitive* system. On the face of it, the system has evolved as a means to offset the vulnerability of those who, without means of their own, will be subjugated to the whims of the owners of the means of production. The argument here is that the sophisticated system of education, reform,

and punishment devised by arbitrators gives employers a honed and adaptive set of tools to control the behaviour of potentially rebellious workers whose natural instinct is to assert their individual autonomy. Employers have been given a set of tools with which to discipline and punish.

## SUMMATION

1. The contract of employment is one into which workers enter because they have to do so if they want to provide for themselves. It is, without doubt, a contract of submission. This chapter shows how law ensures that it is also a contract of subordination. Law and its functionaries go out of their way to give the ownership of the product of workers' labour to the employers after they have paid the workers as little as possible for their labour; they go out of their way to make it as easy as possible for employers to force workers to give up much more of their potential productive capacity (constituted by their personal attributes) than workers would voluntarily yield to them.
2. To avert criticism, law, having guaranteed the freedom to one and all to enter into contracts as legally autonomous individuals, holds out the pretense that the resulting contracts and their terms and conditions are the outcomes of voluntary decision-making, even when the contracts are arrangements between the owners of wealth and those without any wealth other than their human capacities. It is then *assumed* that workers, having entered into these contracts voluntarily, would have willingly agreed to obey, be of good faith and fidelity, and be as diligent as possible, even if this meant giving up their personal autonomy. It is a threadbare line of argument. It is ever so slightly more persuasive when workers are not bargaining as individuals, but not all that convincing. Even when workers bargain collectively, the imposed duties which subjugate them apply to them as individuals.
3. This was (somewhat artlessly) acknowledged by the Woods Task Force (1968), a major Canadian task force on Canadian capital-labour relations. It concluded that the system was still based on private property, and that contract principles promised freedom (in the liberal sense of individual freedom from interference) but produced a rather special set of contracts.

These contracts establish relationships which the task force described as relationships between a superior party and an inferior one.

4. More recently, the English scholar Hugh Collins, after painstakingly parsing the elements of liberalism, reluctantly concluded that the employer-employee relationship was simply illiberal. He noted that a liberal State, if it wanted to be a liberal State, was not allowed to have the powers our supposed liberal legal system bestows on the employing class. He imagined a government that announced to its subjects: "You must obey all our instructions to the letter and always act in the best interests of the government, including always praising it and never criticizing it; senior members of staff of the government such as the President must always be treated with deference and uncritical obedience; and to ensure compliance with this instruction, the government will use every means of surveillance available, in order to monitor your behaviour to ensure that you follow the letter and the spirit both when you are in public spaces such as your workplace and also at home." Collins did not hesitate to characterize such an imagined government's subjugation of its subjects as authoritarian, illiberal, and profoundly antagonistic to liberalism's promotion of freedom and values such as dignity, privacy, and equality. Yet the contract of employment expects precisely this kind of subservience from the inferior party, from workers. For liberals like Collins, this is anathema. His solution, and that of other liberal pluralists such as those who wrote the Woods Task Force report, is not to change the system which leads to this parlous circumstance but to alleviate its more anti-liberal impacts.
5. In the end, it is all plain enough. Once workers enter into a contract of employment, the class nature of our society becomes evident. Owners of the means of production constitute one class, the dominant class. Workers constitute the dominated class, commodities to be used by the dominant one. Rutgers Professor of Communications Stanley Deetz wrote: "Employee obedience to those in power supersedes any private romantic loyalty to church, family, community, or nation-state. *The employee is first a resource, never a citizen*" (emphasis added). The next chapter takes up this theme.

CHAPTER 9

# *Essential workers*

If a man had money, he was free in law and in fact, and if he had no money he was free in law and not in fact.
—JOHN GALSWORTHY, *The Forsyte Saga*

### *PLUS ÇA CHANGE, PLUS C'EST LA MÊME CHOSE*

As this is being written, the coronavirus pandemic is still going strong and worrying societies. Of course, it is by no means the first time the world has suffered a pestilence, and it is intriguing that, while technologies have made a difference, there are great similarities between the coping mechanisms developed several centuries ago and those favoured today.

In 14th-century Venice, the locals were ignorant about germs, bacteria, and viruses. There was none of the science, on which we claim to rely, to follow. But when the plague hit Venetians, they quickly realized that the infections spread very quickly and, frighteningly, did so in some invisible way. It made sense to them not to breathe the air that might carry whatever was affecting some people in their community. Touching them was to be avoided. They moved those already afflicted to a separate island to be treated, and any new visitors to Venice were also to be detained there for a given period, forty days; "quarantina," they called it. The people on the island were to be treated and the carers were equipped with those fancy masks whose replicas are now sold in Venetian souvenir shops. The idea was to ensure that as few people as possible would come into contact with infected or potentially infectious people, and that those who had to deal with them would have to share as little of the ambient air around them as possible.

Today, we have developed tests which detect the presence of virus in people not yet obviously afflicted, enabling us to isolate them and to locate people with whom they may have been in contact. And we have vaccines which help us develop antibodies which will ward off the worst impacts of infections. We still mask and try to practise social distancing and force people out of circulation when they are endangered or might endanger others. We also lock down our borders to keep out visitors who might bring the disease with them. There have been some advances, but the core approach is remarkably similar. And our coping mechanisms are like those of the 14th century in other ways as well.

As noted in chapter one, when the Black Plague hit England in the mid-14th century, the rich and powerful enacted a law which required all the non-rich and powerless to work, whether they wanted to or not. *The Statute of Labourers* of 1351 made it compulsory for all men, women, and children who did not own land or have a recognized status as a craft, trade, or merchant guild member to work for any owner of land at wages that prevailed before the plague had decimated the population.

Our parts of the world have responded in a less draconian but not dissimilar manner to COVID-19. The strategy has been for governments to decide which businesses are essential to public welfare and then classify those who work in those businesses as essential workers. While, unlike 770 years ago, it is not a criminal offence to refuse to work if deemed essential, governments can and will withhold welfare benefits from such rebellious workers, leaving them to their own devices. Most have little savings, if any, and, without any source of income, would quickly find themselves unable to meet their needs if they refused to do work which has been deemed essential. The bottom line is that they have been given a false choice, a quintessential Hobson’s choice, a choice between accepting something they do not truly want or getting nothing. Workers deemed to be essential workers are being coerced. While this kind of coercion is not, conceptually, the same as the authoritarian decree found in the 1351 law, it does approximate it, rather unnervingly so. This should worry those who claim adherence to a liberal polity and legal system.

The feudal lords who used law instrumentally to compel workers to serve them justified this exercise of power in the long preamble to the statute by pointing out that, as close to half the population had been felled by the pestilence, there was no one to herd the cows and sheep, to seed and till the soil, to pick the fruit, or to harvest the crops. It was not a consumer society, and these listed agricultural productive tasks were pretty well all people did by way of work. If these tasks were not done, the essential needs of society would not be met. This reasoning was used as a justification by the powerful to coerce the less powerful. Of course, it was more than a little self-serving. The lords had no intention of doing that necessary work themselves. It was imagined neither by them, nor by anyone else, that they could be expected to do so. After all, this was a society built on status. The duties and obligations of people depended on their relations to the ownership of land and to landowners, or on their being members of a craft, trade, or merchant guild. Everyone had a status which they could not change, their personal talents and efforts notwithstanding. Under feudalism, some people were legally classified as being politically inferior to others, and it made legal and political sense to require them to serve their superiors. This is a major difference between a liberal polity and a feudal one.

At the heart of liberalism is the belief that all individuals are free to think and act as they choose. No one is to coerce them into thinking or doing anything they would not choose themselves. The autonomy of politically sovereign individuals is what liberalism promotes. This political and legal standing is to be constrained only inasmuch as it is necessary to do so to allow a society to function; no more. A minimum of political interference with individuals' decision-making is the starting point.

Capitalism, claiming it is based on the functioning of unfettered markets, allies itself with these principles. For markets to operate, each of us is to be able to choose what we want to make and exchange with others who are doing the same thing. We are to use our assets as we decide, on the basis of what we believe is in our own interest. If we are all left free to do this, we should, in the long run, be able to satisfy our needs and desires as we, as individuals, formulate them. Again, a minimum of political interference is the starting point.

It follows that the declaration that, during the current pandemic, some workers should be deemed essential and, therefore, must work for their

employers is precisely the kind of political intervention that requires justification. It turns out that it is much harder to accept the justification on offer than the one proffered by feudal barons. They, it will be remembered, asserted that the lack of willing workers had created an existential crisis, that the very survival of society was in play. Some of that is also true today: some food, clothing, water, electricity, and the like need to be provided. But we have not stopped there. To make the point, I offer a sampling of the Ontario regulation that specified what could remain open, what could remain open subject to some constraints, and what had to be closed.

Open and subject to some rules were: supermarkets, convenience stores, indoor farmers' markets and other stores that primarily sell food, agriculture and food producers, resource and energy suppliers, community services (which meant utilities such as sewage and water provision, health care, and social services), pharmacies, discount and big box retailers that sell groceries, stores that sell liquor, including wine and spirits, gas stations, construction, snow clearing and landscaping services, security services for residences, businesses, and other properties, domestic services, courier, postal, shipping, moving, and delivery services, funeral services, staffing services providing temporary help, laundromats and dry cleaners, veterinary services, boarding kennels, trainers of service animals, cheque-cashing services, financial services, real estate services (but no open houses), telecommunication and IT infrastructure / service providers, newspapers, radio and television broadcasting, film and television post-production, visual effects and animation studios, book and periodical production, publishing and distribution businesses, commercial and industrial (but not retail) businesses, some entertainment venues, businesses that supply any of the businesses permitted to remain open, maintenance and repair and property management businesses, transportation services … indeed, it seemed as if hardly anything was completely closed. Thus it came about that in the Greater Toronto Area, 67.5 percent of workers were categorized as essential workers, as workers expected to do their jobs as if there were no pandemic.

A much shorter list was the one which provided what was to be closed with only tiny exemptions. It included museums and cultural amenities, horse-racing venues, nightclubs and strip clubs that do not serve food and liquor, zoos and aquariums—although the animals could be cared for by

some essential workers—amusement parks, water parks, bathhouses and sex clubs, tour and guide services, motorsports, casinos, bingo halls, and gaming establishments.

What could possibly justify the political coercion of so many people to work during the current pandemic, given that so many worked in spheres which did not have much to do with survival, with ensuring the biological survival of people? While the Black Plague statute did serve the interests of the lords and barons, it manifestly supported life itself, not just convenience. This is hardly true of, say, animation studios, or television post-production or the completion of yet another tall tower or the maintenance of kennels. The question should become more troubling once it is understood what deeming workers essential actually meant to the workers.

First, it is worth identifying who they are: personal caretakers, custodial staff, nurses, paramedics, doctors, agricultural workers (many migrant workers on special visas), teachers and cleaners, caterers, and other workers in education, meat-packing workers, construction workers, retail store shelf-stockers, cashiers, warehouse and storage house workers, couriers and deliverers of all kinds, truck drivers, train, streetcar, and bus drivers, transport maintenance workers, garbage collectors and sorters, mail sorters and carriers, guards and their prisoners who work. All were asked/coerced to take tremendous risks. All of them come into contact with fellow workers, with people who move on public transport systems, with their own families, some of whom may well work in essential services themselves or have to go to schools. Very few of them have paid sick leave entitlements, which makes it hard for them to stay home when they feel ill, intensifying the risk of spreading the disease.

Second, and totally unsurprisingly, the workers affected are disproportionately women, racialized, recent immigrants, and residents of the poorest parts of any city. It took a while for people to come to grips with the fact that it was the most marginalized among them who were being asked/coerced to bear the brunt of the coronavirus pandemic. The truly rich and powerful—leaders of great corporations, military leaders, judges, eminent political figures, financial investors, hedge fund managers—if they worked at all, did not have to mingle much, if at all, with the at-risk population. This was also true of many workers who, while designated as

essential workers, could work from home. To them all this was a nuisance and inconvenience, but not an existential threat. Being asked/coerced to work had nothing like the impact on them that such asking/coercing did on the bulk of essential workers. Marxist geographer and theorist David Harvey put this colourfully:

> The virus, it is said, does not discriminate. Well no! Like the *New York Times* Editorial Board, I live comfortably isolated at home drawing my salary, dependent upon a segregated workforce that has to grapple with the existential choice between eviction and starvation through unemployment on the one hand, or keeping the city and its networks of care and comfort running for a measly wage on the other. And they also have to confront a potentially deadly virus on a daily basis. In what zip code do those workers reside? And what proportion of them are people of color, recent immigrants, Latinos and Latinas? How many laptops do the kids possess?[5]

The data already gathered answer the questions Harvey poses. Those sectors whose operations suffer disproportionately—such as accommodation and food industries, information, culture and recreation sectors, and wholesale and retail trade—employ more racialized female workers than other sectors. If deemed essential, their health risks are increased and so is the likelihood of losing their not-very-well-paying job. Indigenous people also find themselves in this double whammy position, as the Canadian Centre for Policy Alternatives reported. An exposé of the plight of migrant farm workers in Ontario (to be discussed in chapter twelve) found that the crowded accommodation conditions, accompanied by uncaring employers, had led to spectacular rates of infection; 196 of the 220 workers at one farm tested positive for COVID. Arianne McNeill reports on studies that showed that, during the first year of the pandemic in the US, working class people had suffered five times as many deaths as had college-educated people; worse, 89 percent fewer people of colour would have died if they had had the same death rates as white college graduates. And the US Poor People Campaign produced a study of 3,200 counties which demonstrated that death rates were twice as high in the poorer

counties. During various phases of the pandemic, poorer counties' fatalities jumped to five times those experienced in the better-off locales.

In a class-divided society, whether it be a feudal or a liberal capitalist one, it is the subjugated class which has to bear the burden of economic and health and safety risks. The pandemic made this clearer to more people than it usually is. Indeed, the pandemic illuminated other aspects of the uneasy relationship between liberalism and capitalism.

## CAPITALISTS' NEEDS ARE NOT PEOPLE'S NEEDS

In a liberal democratic polity, elected governments are charged with ensuring the general welfare of the population. Thus it has been governments which have decreed what goods and services *must* be delivered during the pandemic. The bases for their decision-making about what and who they think important reveal much about the kind of polity they actually help to maintain and perpetuate and how they see employer-worker relations.

There are goods and services which governments provide directly or in whose provision they play a large, most often a determining, role. Health, education, and policing come to mind; governments classify them as essential services. But their interventions do not stop there. In societies such as the Anglo-American ones, governments are wedded to the idea that the private sector, driven to pursue profits by competitive forces in a market setting, will deliver what people need more efficiently than any government could. Governments have internalized the mantra that, as government decision-makers are not informed by demands made in a free market economy, they are not well positioned to know what people want and need. Thus it is sensible, they believe, for governments to decree some privately delivered goods and services to be essential. This starting point leads to some awkward issues for elected politicians as they make decisions. How do they determine which privately generated goods and services are essential in the same way as government-produced ones?

Capitalists, unlike governments, do not produce goods and services just because they are needed. To the contrary: their chief concern is whether the production of a particular good or service will yield the best return on any one investment. The potential for profit is what guides capitalists; other considerations are of little account. Capitalists are under unrelenting

pressure to generate profits. This forces them to expand markets, in both size and kind.

The intensification of the privatization of what used to be governmental production of goods and services, by means of outright sales, outsourcing, and public-private partnerships, is part and parcel of these ceaseless searches for new areas in which profits are to be found. For-profit actors are increasingly doing things which governments traditionally deemed essential to the welfare of the populations they govern. As governments reduce their direct delivery of services or goods, their reliance on the private sector deepens. The acceptance of the idea that this devolution, this reduction in government functions, is inevitable and, indeed, the way it should be enables politicians to indulge what may well be their instinctive preference, namely to support and applaud the owners of the means of production, as they make their bid to be seen as central to the provision of societal welfare. This puts us all on a slippery slope, one which leads to the establishment of a more fragile, a less secure, society, and one in which notions about what people need become ever more fuzzy.

Capitalism's logic drives capitalists to manipulate people into demanding more goods and services. Capitalists encourage consumerism, they work hard at making people desire ever more goods and services, to make people feel that they really need them. The late Canadian political scientist Michael Lebowitz captures it well:

> Advertising to create new needs [is] … everywhere. The enormous expenditures in modern capitalism upon advertising, the astronomical salaries offered to professional athletes whose presence can increase the advertising revenues which can be captured by mass media—what else is this (and so much like it) but testimony to capital's successes in the sphere of production? Those commodities must be sold—the market must be expanded by creating new needs.[6]

Business affairs journalist David Olive has described the emptiness of it all by defining advertising as "words and pictures, often set to music, designed to correct the mistaken impression among consumers that their lives possess meaning in the absence of a receipt for a particular product in their sock drawer." And it works.

This boosting of markets by creating demand for things which affect lifestyle but do not add—indeed, may subtract—from the capacity to survive, characterizes our modern capitalist political economies. Who needs tobacco to live? Alcohol? Soft drinks with addictive chemicals in them? Appliances which will obey voice commands so that we do not have to switch on a light or touch a control on our equally unnecessary television sets? Or a gadget that enables us to determine how many steps we have taken today? Or the running of car races by profit-seekers selling polluting oil and promoting private transport in dozens of cities? Or perfumes or deodorants or hair curlers? Or the stock markets where people buy and sell betting instruments, sardonically called financial "products"? Or recreational guns? etc., etc.

Confusion is created. What people need to survive, quite literally, and what they think they need because of the importance they attach to what capitalists have taught them to believe is essential to their lives is blurred. The word "needs" has been given distorted, but widely internalized, meanings. In this context, the long and ever-changing list of what various governments declare to be essential services and undertakings makes some sense; it is inevitable that there will be controversy over the compilation of the list. It helps explain why inconsistencies are built into any set of declarations that some activities are essential, leading to envious cries of discrimination by those not labelled essential or subject to more restrictions than very similar businesses. Much depends on whose ox is being gored. This brings out a point about the differential way in which we treat workers and their potential employers.

During a pandemic, businesses want to stay open. They want to continue to make money. They want to be declared essential. If their plea succeeds, employers win. Workers lose. Owners (and often the legal owner is non-human) run little to no risk of being struck down by the virus. Workers run a great deal of risk if employers retain the right to operate as close to normal as possible. Governments have not been shy about imposing those risks on them.

Governments do so, in part, because, as seen, they find it hard to distinguish between the absolute needs that people have and their desires for convenience and consumption satisfaction. This confusion makes it seem as if anything that the owners of the means of production do serves

some public need, and so workers may be asked/coerced to do their bit. In addition, governments are minded to think in this manner because it fits in with their vision of what a liberal *capitalist* democratic polity holds dear. They are ideologically committed to furnish capitalists with what capitalists need to be effective capitalists. And what capitalists need (and want) is to have as much freedom as possible to determine how they will satisfy their drive for private accumulation of socially produced wealth. Governments are there to protect their right to invest their property in whatever way individual owners decide is best for them. The belief is that this serves the overall good. But that accumulation model favours growth in wealth as it is measured quantitatively, not qualitatively. It is an economic model which privileges growth in monetary terms; it eschews the idea that there might be an alternative, a model which might reduce monetary wealth but keep more people alive and healthy. The way in which Anglo-American polities have been dealing with the pandemic illustrates how their starting point allows the owners of wealth to be helped to be profitable while workers are sacrificed.

Governments have allowed capitalists to externalize their costs while normal business is interrupted. Employers have laid off masses of employees, leaving their survival to the ministrations of governments. That is, governments, all to different extents, have stepped in to provide people with income that the private system, despite the claims made on its behalf, cannot guarantee. More, some employers have been given direct subsidies to continue to employ some workers, even though their operations are down. Even more telling is that our kind of governments are so keen on keeping the normal private competitive economy going that they are willing to allow businesses to remain open until the number of illnesses and fatalities overwhelm the hospital and eldercare systems. And not to put too fine a point on it, most of those succumbing to disease and death are workers who have been asked/coerced into working. “Essential” workers are disproportionately sacrificed. In sharp contrast, little is demanded of the owners of the means of production.

While there are a myriad of governmental interventions to ensure that the owners of the means of production can operate as close to normally as possible, governments have not felt themselves compelled to ask capitalists to do anything they do not choose to do. Governments respect the fact that

capitalists do not want to be told how to use their assets. While workers are sought to be placated by slogans such as “We are all in this together,” and they are told by editors, politicians, and pot-banging householders that they are admired for their (asked-for/coerced) contributions to the general good, nothing is asked of employers except that they continue doing what they would prefer to do. They are not asked to put their assets and know-how to direct public use. There is no requirement to produce all the personal protective equipment that would keep more people safe, especially those working in the health sphere. It is not demanded of them that they make facilities available for treatment, or put their technology to use to assist public health authorities to test, contact, and communicate. And, of course, drug manufacturers are not asked to share their precious vaccines with the billions of people who urgently need help. They are allowed to make superprofits. That is their birthright.

Any government that made “unwanted” demands of this kind on the owners of the means of production would be characterized as authoritarian, of using methods abhorrent to a liberal democratic society. The sovereignty of individuals and their private property is sacrosanct. The sovereignty of individuals without any property other than their capacity to labour, however, is not so respected. What the pandemic has shown is that the logic of capitalism dictates that the freedom of capitalists necessarily entails the subjugation of the working class. This consequence should be unsurprising. All the pandemic is doing is to make it more obvious to more people than usual. There is freedom from authoritarianism for some, but not for all.

## ESSENTIAL WORKERS IN NON-PANDEMIC TIMES

The major feature which differentiates capitalist relations of production from other systems is its drive for accumulation of private wealth in a competitive setting, such wealth to be attained by extracting more value from the collectivized wealth produced by suppliers of labour who are paid less than the value of their output. As the Robert Fischl student exercise cited in the previous chapter demonstrates, there is no capitalism without the appropriation of value created by workers. In this sense all workers are essential to capital.

Mick Lynch, general secretary of the National Union of Rail, Maritime and Transport Workers, puts it this way: “A wheel does not turn, a light

does not go on without us. We create all of the wealth in this society, all of it. It is our labour which delivers the services, makes the goods, and distributes them to the people."

If this is true, why, then, do workers not do better, why are so many of them working on terms and conditions which do not allow them to do much more than scrape by? One reason for their obvious failure to do as well as they should is the role which law plays as it sets out to maintain and perpetuate capitalist relations of production, that is, the system which requires labour to be as costless as possible. This pushes law to enfeeble any potential bargaining powers that workers might have by dint of their centrality to the system.

Having placed the structural blocks for capitalism firmly into place, namely the right to own private property, which enables the owners to determine what they shall do with it, and having embedded the right of workers to sell their labour capacities, complemented by an ideological framework that makes it very hard to call these structural bases into question, law is in a position to instrumentally aid capitalists as they struggle with the working class. It does so. Often this is blatantly obvious. Contrast two real-life scenarios:

**(a)** A pharmaceutical firm has a monopoly over a needed drug. It decides that it will not supply it to those who need but cannot afford to pay for it. Those people's health will be adversely affected. Occasionally a government might pay for the drug, in which case the pharmaceutical firm will deliver the drug. Often a government will confine itself to vexedly expressing its dismay and may try to cajole the pharmaceutical firm into relenting, to be kinder and gentler. The government will not use its legal power to coerce the pharmaceutical firm to do anything. The pharmaceutical firm is an owner of means of production. Law is not to be used to coerce it or any other members of its class.

**(b)** A union has a monopoly over garbage collection. It demands better wages and enforces its demand by striking the employer who refuses to pay any more. This affects public health adversely. If the strike continues for any length of time, a government is very likely to order the garbage collection workers to go back to work, more often than not on the same terms which they have lawfully rejected. An arbitrator will be appointed

> to determine the terms and conditions of a new contract with their employer. If they refuse to abide by the order to return to work, the union and individual workers may incur severe penalties. They are not owners of means of production. They are workers. Law feels free and justified to use its power to coerce them.

The difference in legal treatment is stark and revelatory. Property owners are not to be forced to do anything they do not want to do, even when their product or service is deemed to be essential. Workers whose supply of labour is essential in exactly the same way will be forced to labour, just as they were during the 14th-century Black Plague. And for this to happen, there is no need that there be an epidemic "forcing" the government's hand. The lesson is clear: law will step in to prevent workers getting too much of an advantage over would-be employers. There are many instances of this instrumental legal privileging of capital over labour. In what follows, I comment on one: the way in which law approaches collective bargaining via trade unions.

As capitalism emerged, it was obvious to workers that the competition for jobs among them could only lead to hardship. One of their responses was to limit that competition, and they formed unions. Chapters two, three, and four describe the many battles that had to be fought by workers, physically, in the courts, and in legislatures. Those fights were necessitated because the owners of the means of production resisted these potential curbs on their search for profits. Both workers and capitalists have always been aware of the verity of the workers' slogan: "United we bargain; divided we beg." It took a long time, but, eventually, the legal right to form unions and to allow them to bargain on behalf of collectivized workers has gained some legitimacy.

The rights needed to make such collective bargaining truly effective vary from jurisdiction to jurisdiction. In none of them are they either full-blown or permanently guaranteed. For example, for the longest time, all Australian workers who belonged to the same occupational category were to be represented by one union which bargained on behalf of all such workers employed in an identified industry. Very soon after unions in North America got the legal standing they have today, they were limited to the representation of the employed by one employer. Such very different

boundaries are themselves reflective of very different political struggles and, therefore, are always subject to change. Today, in Australia, unions' bargaining rights have edged much closer to the North American model, while the North American model itself represents a winding back, first, of the early-20th-century movements to create one big union where bargaining was intended to be economic warfare between all workers and all employers and, then, of efforts by unions to be allowed to bargain on behalf of all workers employed in one industry (see chapter four for a longer discussion).

In all jurisdictions, there are likely to be workers in the private sectors who may not be represented by unions at all. Such a constraint is often imposed by law. When the constraint is imposed, it is because some workers are seen as vital to the employers' ability to exercise their control over their property. Thus, anyone who might have some discretion over the deployment of the property (sometimes as lowly a person as a foreman), or who has access to confidential information about the employers' books and plans, may be excluded from union coverage.

To form a union of approved workers, workers must clear a series of procedural hurdles before that union will be given legal standing to bargain on their behalf. For instance, they might have to prove that their chosen association is one that does not compete with an existing one or that its proposed bylaws fit with the scheme devised by law. Again, there are many variants which are left aside here; the point is that not all associations will be allowed to function as unions with full bargaining rights. Once a union has established itself as such, its negotiations may be given more bite because they will be able to threaten to withhold the supply of labour from employers. They will be allowed to call a strike. Again, while the processes vary across jurisdictions, strikes will not be legally supported until unions have satisfied a number of quite onerous requirements. For instance, they may have to conduct ballots to show support for a strike, something which leads to many challenges and costs; they will have to give notice ere they may strike, leading to a weakening of the threat; they may have to submit themselves to more negotiations, or conciliation or mediation procedures. Life isn't meant to be easy for potentially militant workers.

The workers' right to strike is not an embedded one. Rather it is a set of immunities (which some prefer to call a set of privileges) they have won,

which protect them from repression by older laws which assumed that it was an abomination for workers to act collectively in a liberal capitalist democracy. The right of employers to strike—that is, to not invest their property or to de-invest it, the right to withhold private property—is actually a *right*, something that cannot be taken away by a legal instrument without justification. The field of battle created by supposedly neutral law is a tilted one. Even more so than described thus far.

If a government is persuaded that a strike conducted by a union which has met all the substantive and procedural requirements imposed by law is harmful to what it deems to be the public welfare, it will simply say "too bad" to the workers exercising their lawful rights. Sometimes governments give themselves the right to suspend the rights of workers explicitly; this was done by the *Fair Work Act* in 21st-century Australia. But this is not necessary. Governments have the residual power to suspend the operation of laws which they themselves have created and, when it comes to collective bargaining laws, they do so quite frequently.

The two scenarios posited above make it clear that when governments choose to ward off what they see as threats to public welfare, they are acting on the basis of having internalized the logic of capitalism. After all, they presumably could offset the adverse impacts of garbage collection (or transport or postal or rail or airline or school) strikes by ordering the employers to meet the demands of the workers in full. There is little doubt that this would restore the imperilled services. This is never done. The structural and ideological pillars of capitalist relations provided by law are so deeply embedded that, when governments force people to work on the basis of terms and conditions they had rejected—as the workers and their union believed they had a legally enforceable right to do—they are perceived to exercise their power to coerce legitimately. This general acquiescence of the propriety of legal intervention with legal rights should be puzzling, as it is manifest that it favours the employers' position over that of their workers and their unions. Yet, if governments have to face any question at all, it is about whether it was really necessary to take away the workers' right to strike as soon as it was done in this particular instance. The logic of this kind of challenge is not that governments should not exercise this kind of power, but that they should do so judiciously. After all, the purpose of a strike is to cause economic pain and discomfort, so why

not let some pain be inflicted? It turns out that, in North America, there is a low threshold for this kind of pain.

In North America, the right to strike is a narrow one; it is limited to one workplace at a time. This diminishes the potential harm suffered by the public at large, although there are exceptions. Even the narrowly based right to strike may cause pain beyond the workplace setting. This is so when the employer is a municipality, or a producer of electricity, or a bus company. Such disputes present governments with a headache. They may be hurt politically if enough people think they got it wrong in any one case; they may be hurt politically if they do not intervene. Still, they do it often and it is fair to say that, in North America, the legitimacy of a government exercising this residual power against workers is rarely questioned, even if a particular use of it meets with disapproval. In the end, there is a tacit acknowledgement that workers are essential to the creation of welfare and may, therefore, be forced to work under conditions they do not voluntarily choose, whether or not there is the kind of pandemic which motivated the barons in 1351.

Sometimes, governments sweeten the pill when they deny individuals their right to assert themselves. In Canada, for instance, medical professionals, police officers, and firefighters are all considered essential and, therefore, are simply not given a right to strike, even if they are allowed to form associations that can negotiate on their behalf. Their power is too awesome to let them exercise it. Their services are just *too essential*. However, this also means that they are highly valued. Doctors, police officers, and firefighters are remunerated rather well. This is not the case for other workers who are integral to the services delivered by these respected professions: paramedics, personal-care workers, orderlies, cleaners, and, increasingly, nurses endure poor terms and conditions of employment. Like their well-remunerated counterparts in their chosen fields, they cannot help themselves by boosting their demands with a threat to withhold their necessary labour. They are viciously exploited. Many of them belong to racialized groups and/or are women.

The notion that, in a capitalist society, law permits people to control their own destiny, to deploy their talents and resources as they see fit, without any interventions by the State, always was, and remains, false. The privilege to be in control of one’s destiny belongs to the dominant class, and

only to the dominant class. The idea is that the members of that class are essential and, therefore, must be given autonomy; workers are essential, both to the dominant class and to the public at large and, therefore, must have their liberty curbed. This is not the logic of liberalism; it is the logic of capitalism.

Here it is useful to note that, just as was the case in 1351, agricultural workers are seen as so essential that, in Canada, they had to fight for decades before it was acknowledged that they could associate with each other to advance their bargaining goals, but, as yet, their associations have not been accorded a right to strike. Unlike doctors, police, or firefighters, they are poorly paid. They are even worse off if they fall under the category of migrant workers.

And there are other like circumstances in which the potential leverage that a right to strike bestows is inhibited by legal fiat. This happens most obviously when the workers are government employees.

## ANOTHER LEGAL MANOEUVRE: SPLITTING THE ECONOMIC FROM THE POLITICAL

Conceptually, an argument is plausible that government employees should be treated differently. Political struggles have led to legal reconstruction of the market for labour by overcoming, to different extents in different circumstances and jurisdictions, the weakness of individual workers when they have to offer their labour power to employers. The notion is that when workers are permitted to withhold their labour collectively, they will be able to convince employers that they will lose more by not satisfying workers' demands than by giving in to them. Collective bargaining is, first and foremost, an economic instrument: it alters the economic calculations of the adversaries. This limits the demands that can be made by workers on employers to being demands for economic gains or for better conditions to be applied in the workplace setting. Collective striking power, being a market-restructuring institution, cannot be used, *legally speaking*, for any other purpose. This restriction raises a question: Does this narrow economic role make sense in the government sectors?

Governments are not trying to maximize profits. They have no structural reason to extract surplus value from their labour force. They are in the "business" of providing services that they have politically determined should be delivered to the public or special segments of it. When workers

make demands that a government does not want to satisfy, the nature of the struggle is different to what it is in the private sectors. Governments find it easy to contend that a group of self-interested workers are making claims which, if agreed to by the governments, will force them to make changes in the quantity and quality of services they are providing. Governments will be forced to make changes to their politically made decisions on how much service or welfare to provide to the public or to specific sectors. In short, they are able to say that a mechanism devised to redress economic power imbalances in the for-profit spheres is being used to change legitimated democratic political decision-making.

This line of argument makes it easy for governments to limit bargaining and strike rights in the public sectors if they are minded to do so. In a letter by President Roosevelt (the man praised for pushing through bargaining and strike rights of workers as part of the New Deal) to the president of a federation of public employees, Roosevelt said that the process of collective bargaining, as usually understood, "cannot be transplanted into the public service … administrative officials and employees alike are governed and guided, and in many cases restricted, by laws which establish policies, procedures or rules on personnel matters." He went on: "Particularly, I want to emphasize my conviction that militant tactics have no place in the functions of any organization of Government employees."

In North America, governments are very inclined to curb any powers public sector employees might gain by having relatively legally unfettered bargaining and strike rights. In the US only eleven states have eliminated bans which existed on public employees' stoppages. In the wake of large-scale teachers' strikes in 2018/19, all of them unlawful, there have been legislative attempts to give public employees more bargaining powers that might allow legal strikes to take place. The fact that governments which adamantly claim they defend the right of all their citizens to assemble, to associate, and to speak freely have, thus far, felt it rather easy to justify their constraints on these fundamental rights when it comes to public sector workers speaks volumes to the power of the argument which allows a liberal capitalist economy to draw a sharp line between the economic and political spheres. Here I remind readers that President Reagan relied on this divide to dismiss all the air traffic controllers when they sought to use their collectivized power to get better conditions. In the end, his argument rested

on the claim that, as the embodiment of a political institution, he was acting on behalf of the public good, while the air traffic controllers were just trying to satisfy their narrow self-interest and using their economic heft to do so.

In Canada, provincial and federal laws sometimes forbid government employees from bargaining about some issues, those issues said to be too important to be left to anyone but an elected government; sometimes, public sector workers are given very similar bargaining and strike rights to those which obtain in the private sector, but some workers may be designated as essential workers. They will not be allowed to participate in any strike, effectively being required to act as scab labour should their comrades take action against their common employer. More importantly, there has been a much-noted increase in the frequency with which governments use their political power to order workers back to work should they engage in lawful strikes, forcing them to submit to an arbitrated set of conditions and terms.

The pandemic drew the public's attention to how essential workers' contributions are to the creation of wealth. It turns out that law creates conditions which make it as hard as possible for workers to use the bargaining strength this should give them.

## SUMMATION

1. This brief overview should suffice to make the point that there is a wide acknowledgement that without the work-for-wages relationship, a capitalist economy cannot exist. In a capitalist economy, it is assumed that owners of capital are crucial, always essential, no matter what they do with their capital. It is assumed that owners of the means of production must not be told how to use them.
2. The drive to search for profits means that capitalists' use of their assets must be interrupted as little as possible. During the pandemic, this requirement forced governments to balance what they called "the economy" against public health measures. Many workers were declared essential and forced to work, whether the output of their work was actually needed or merely desired. Their freedom to sell their labour power was turned into a legally enforced duty to do so. This drew attention to the fact that many lowly regarded and vulnerable working

class people contribute to profitable undertakings but are not rewarded accordingly.

3. In turn, these measures brought out the fact that, in non-pandemic times, the self-same workers do work that is essential to capitalists. Governments have internalized the unchallengeable nature of private property rights and the emphasis on individualism and go out of their way to ensure that capitalists will not be robbed of essential workers as defined by capitalist needs.
4. Workers are exploitable because of their numbers, and they seek to reduce competition among themselves. Capitalists do everything within their power to blunt collective working class responses. Capitalists faced with collectivized workers can count on governments to limit the powers of workers who have won some collective bargaining and strike rights.
5. Governments treat their own employees as essential employees on the basis that the governments are delivering essential services. For such democratically mandated services to be interrupted by striking workers is an unwarranted use of economic power to defeat the legitimate exercise of political power.
6. To maintain capitalist relations of production, it is necessary to treat members of the working class as inferior members of the polity. This logic will not change until the structural and ideological foundations provided by law are confronted. Merely to change the instrumental laws which momentarily regulate the settlement of capital-labour disputes will not allow workers to become equals, even if they win some relief from some of the harsher outcomes which they currently endure.

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CHAPTER 10

# *Executives: In a class of their own?*

Not all workers for wages feel that they are exploited, that their contributions are not valued. Not all believe that the system is unfair. Take a story about some baseball players which got a lot of coverage in Toronto.

The Kansas City Royals were due to play the Blue Jays in Toronto. It turned out that ten of Kansas's first-ranked players had not been vaccinated and, as Canada forbade people with inadequate anti-COVID-19 vaccinations from entering the country, the Royals had to send a team missing some of their first-choice players. The Kansas City Royals announced that the missing players would have to forfeit four days' pay, that is, the pay they would have earned for the Toronto engagement. For the least well paid of them, this signified a loss of US$15,385; for the best paid among them, the loss was to be US$186,813. Eye-popping numbers: the least well paid player was earning nearly US$4,000 per day, the best off about US$46,000 each and every playing day.

These athletes, and a small number of people similarly endowed with special and unusual gifts, undoubtedly know that they are essential participants in markets where profits are high and in which their rare talents and extraordinary efforts to develop them have given them great bargaining leverage. To them, the assertion that capitalism is a system of social relations that rewards talents, skills, and efforts, that it is a system that brings out the best in people because it shows its concrete respect for demonstrated merit, must make eminent sense.

Is this true for all those who are richly remunerated? In particular, does the gobsmacking remuneration of executives and senior managers who practise their arts in large for-profit corporations invite the same

conclusion? Is it their special gifts, their established merit, that are being justly and understandably rewarded?

## LEGAL INDICIA: DO THEY NOT MAKE EXECUTIVES AND SENIOR MANAGERS "EMPLOYEES"?

When a large corporation needs executives or senior managers, it identifies the skills it wants them to have, hires an executive recruitment firm which scours the labour pool of people with such skills, assesses the potential hirees, and makes recommendations. While more intricate and costly, in essence this is what every employer who needs labour power does. In the executive and senior managers' setting, as in "lower" level hiring situations, the ensuing contract of engagement will set out the terms and conditions of employment, such as remuneration for work done and the goals and tasks which are to govern executives and senior managers. They sure look like employees, raising the question: Why are they paid so much?

### GREED OR MERIT?

Annually, the Canadian Centre for Policy Alternatives produces a report on CEO compensation. In the latest report, it calculated that the average total compensation for the 100 best-paid CEOs in Canada in 2019 was $10.8 million. The average Canadian salary was $53,482. By 11:17 a.m. on the 4th of January of a new year, a top Canadian CEO had earned the salary a typical worker would have earned by December 31 of that same year at that CEO's company. The average top CEO earned 202 times what the average worker was making.

In the 1990 film *The Bonfire of the Vanities*, based on Tom Wolfe's book, a rather exasperated mother tries to explain to an eight-year-old how her father makes his living. She explains that someone, not daddy, makes a birthday cake and then daddy hands it around and, as crumbs fall off it, daddy picks up the crumbs.

## DO EXECUTIVES AND SENIOR MANAGERS HAVE A SPECIAL LEGAL ROLE WHICH DISTINGUISHES THEM FROM "EMPLOYEES"?

Executives and senior managers (and some other officers of the corporation) are statutorily required to act in the best interests of the corporation which has hired them, something that is not explicitly part and parcel of other hirings. This leads some commentators to argue that, unlike others who are under contract to work in return for wages, executives and

senior managers have a fiduciary duty toward their employer, the corporation. The suggestion is that their role is a very special one, one akin to that of a trustee, that is, like that of a person whose primary legal task is to look after specified persons who are intended to be the beneficiaries of the management of a fund or assets. This pictures executives and senior managers as very different beings to run-of-the-mill workers for wages. In law professor Bruce Welling's phrase, "they are expected to be high-minded and forthright." Having such special responsibilities elevates their status and might go some way toward explaining why they deserve levels of respect and remuneration not accorded to other workers.

But to see executives and senior managers as having trustee-like status is not all that convincing, at least not in legal terms. The beneficiary whose best interests the law requires them to serve is the corporation, and the assets they manage belong to that corporation. That is, the intended beneficiary is also the legal owner of the means of production being administered by executives and senior managers. For law to accept a relationship as one between trustees and beneficiaries, that is, one which imposes fiduciary duties as a matter of law, the trustees must have legal ownership of the assets. This gives them the powers they need to discharge their duties to the non-owning beneficiaries of the trust. As the trustees' fiduciary duties require them to protect the fund or assets managed on behalf of the beneficiaries, they must show great caution, to act as conservers, to be conservative. A corporation, by contrast, expects its executives and senior managers to be innovative, to put the assets owned by the corporation and beneficiary to uses which yield profits, that is, to be risk-takers.

This, of course, does not gainsay the claim that the executives and senior managers owe something *like* a fiduciary duty to the corporation (and perhaps to others). It is still possible to mount an argument that corporate law, which legislatively requires executives and senior managers to act in the best interests of the corporation, is demanding a standard of behaviour that makes them different from other employees. This, perhaps, would support a case to reward them differently, to pay them better, than other kinds of employees. Is there any legal argument that they must abide by different, more stringent standards?

At the very least, the obligation executives and senior managers owe to the corporation is for them to avoid a conflict between their duty to the corporation and the furtherance of their own interests. On the face of it, this obligation is not peculiar to executives and senior managers (or directors and personnel called "officers" in corporate statutes, all of whom have a duty to further the best interests of the corporation). That kind of obligation may be found to exist whenever one person has scope to exercise discretionary power over assets and thus affect an intended beneficiary's interest, or where a particular beneficiary is especially vulnerable to the impacts of the conduct by the person with discretionary power. This was authoritatively established by the Supreme Court of Canada in a 1989 case called *International Corona Resources Ltd.* v. *LAC Minerals Ltd.*

Many kinds of relationships, then, may lead to an assessment that a fiduciary-type set of obligations exist, even if purists might want to argue that in many of these cases the appellation "fiduciary" is not appropriate. The advantage of classifying a relationship as belonging to the genus of fiduciary is that equitable remedies of accounting, specifically developed to protect beneficiaries of a trust, might then become more readily available. This offers the kind of redress that is often sought when there is a claim that a discretionary power was exercised wrongfully. There is, then, a push to expand the number of situations which have fiduciary characteristics, as this classification will provide useful remedies not otherwise available. This desire to expand the relationships to which fiduciary-like principles might apply is buttressed by a general principle by which a liberal legal system purports to live.

Commonly shared social and legal values frequently emphasize the need to encourage trust in community relations. Thus, we expect that judges should recuse themselves if they can be seen to have a personal interest in the outcome of a case to be heard by them. The mere appearance of a conflict between the duty to be neutral and the pursuit of self-interest threatens to impugn the integrity of the justice system. So it is with bureaucrats and regulators and, of course, politicians whose personal interests might be advanced by the enactment of a law in which they play a role. This does not mean that a violation of the spirit underlying these kinds

of values always leads to sanctions for violators, but, when potential violations are alleged, it is commonplace for the public to express its disappointment. Such violations are taken as a signal that the trust necessary for a well-functioning society is being undermined. Simply put, it is wrong for persons with legally imposed or assumed duties to others or to social goals to use their powers to serve their own interests.

In and of itself, the burden of having to live up to such notions does not justify the astonishing level of remuneration executives and senior managers enjoy. To reinforce this point, I return to law's imposition of enforceable duties on employees in each and every contract of employment. Those imposed duties include a duty to exercise reasonable skill and effort, to act in good faith, and to be loyal to the employer and its business. The employer has a right to force people to work harder, less sloppily, and to advance the employer's interests when they clash with those of its employees. In short, the law imposes a duty on employees to put the interests of the employer above their own. The stringency of this demand does not lead either to the respect or the generous remuneration of the kind lavished on other kinds of employees—executives and senior managers—who have similar obligations. We still have not uncovered any capitalist or legal logic which explains the gulf in remuneration between corporations' executives / senior managers and their "ordinary," "lesser" employees.

### ONE REASON: IT MAKES SENSE FOR CORPORATIONS AS POTENTIAL VICTIMS TO BUY OFF THEIR EXECUTIVES

It turns out that corporations, as employers, have soundly based grounds to fear that managerial employees might not, much like those of a much "lower" order might not, expend enough effort on behalf of the corporation and/or might abuse their inside knowledge of their employers' business practices and processes. Indeed, the corporate literature spends an amazing amount of time discussing what it recognizes as the dangers presented to corporate employers by what it calls "looting and shirking" by executives and senior managers. When executives and senior managers are thought to be shirking and looting, there is much talk of their breach of their fiduciary responsibilities. As seen, breaches of their legal duties by "ordinary," "lesser" employees make them subject to quite severe disciplinary sanctions. Not so when executives and senior managers commit analogous

breaches. They are not punished in the same way. It is as if their employee status is to be ignored, allowing them to be treated differently. And from the "lower" employees' vantage point, this means that glaring disparities are permitted to reign, apparently for no good reason.

It is this which gives the Canadian Centre for Policy Alternatives credibility when it denounces the injustice of it all every time it brings out its annual report documenting the earnings of CEOs and compares them to the wages of the workers they command. It is this which gives resonance to the bitterness of Sarah Anderson, when she wrote, for the Institute for Policy Studies, that "it is not hard to understand why the public is angry about a Wall Street bonus culture that is thriving while workers are still suffering the effects of the 2008 crisis." This is part of a report which showed that the bonus package of 172,000 Wall Street employees was $25 billion, a sum enough for 2.6 million restaurant and bar servers to have their hourly wages lifted from $11 to $15 and still leave $10 billion to spare. The executives and senior managers had been in charge when the corporations tanked; on the face of it, they may well have been in breach of their obligations to their corporations. This gulf in treatment between employed executives, senior managers, and the like, on the one hand, and "lower" level employees, on the other, raised the hackles of Bernie Sanders when he expressed outrage that 25 hedge fund managers made $153 billion in 2017, doubling the income of 140,000 kindergarten teachers. And Robert Reich, former secretary of labour in the Clinton administration, pointedly observed that he doubted that the vast sums paid to hedge fund managers, executives, senior managers, and the professionals who looked after them could be justified by the utility of their labours, certainly not when compared to social workers who work with patients dealing with mental illness or substance abuse and were paid $18.14 an hour, or to personal-care aid workers who earned $9.67 an hour, or to hospital orderlies, paid $11.63 an hour, or to childcare workers, hired at $10.33 an hour, or to pre-school or kindergarten teachers, not to speak of actors, painters, poets, and writers.

As if to exacerbate this sense that law pertaining to employees is being applied unevenly and unfairly, workers and their allies are reminded, all too frequently, of how this preferential treatment allows those "special" kinds of employees, CEOs and senior managers, to hurt and taunt them. There are daily instances of brutal, ostentatious, vulgar behaviour as CEOs and senior

managers show their indifference for the welfare of “ordinary” employees and brandish their sense of entitlement as they enjoy the luxuries of their astonishing incomes. Examples abound. In the turbulent 1990s (turbulent for corporate profits, that is), executives like Albert J. Dunlap made names for themselves. Dunlap was the CEO of an indebted US corporation, Scott Paper. He stripped it down, sacking 11,200 workers, and had Scott Paper bought by another corporation. Dunlap was rewarded with a $100 million salary plus some bonuses. He then did the same kind of thing when a corporation called Sunbeam Corporation called on his special skills. Here the workforce was slashed from 12,000 to 6,000 employees. Again, Dunlap was more than handsomely paid. He joyfully accepted nicknames such as Chainsaw Al, The Shredder, and Rambo in Pinstripes. There were many like him—Robert Palmer, who got rid of 20,000 jobs at Digital; Robert E. Allen, who sacked 40,000 workers at AT&T; Louis Gerstner Jr., who laid off 60,000 people at IBM—all richly rewarded for their efforts. There were so many of these swashbuckling anti-worker CEOs that *Newsweek*, in February 1996, ran a cover story about them with the title “Corporate Killers: Wall Street Loves Layoffs, but the Public Is Scared as Hell. Is There a Better Way?” There was much public rumbling about the harshness and unfairness of it all, yet this did not—and still does not—persuade CEOs and senior managers to keep a low profile. For an egregious example, note that the CEO and his managers had won perquisites at RJR Nabisco which included a fleet of executive jet aircraft, complete with hangar. They called this fleet “Air Force”; pompous and grandiose, to say the least, showing not even the slightest sensibility about how “lower” level employees and the larger public might see this kind of excess. The title of the book which documents this crude display of entitlement at RJR Nabisco said it all: *Barbarians at the Gate.*

## THE DUTY WHICH EXECUTIVES AND SENIOR MANAGERS HAVE AND “ORDINARY,” “LESSER” EMPLOYEES DO NOT

The corporate sectors’ response to the suggestions that something is seriously amiss because some employees are treated markedly differently to others is that they are based on a fatal misconception. They do not take account of the special nature of the work done by those employees who work as executives and senior managers. While egregiously self-serving

bits of conduct, such as buying unnecessary jets, are regrettable, this does not mean that it is right to compare the duties of CEOs and senior managers with those of “ordinary,” of “lesser,” employees. After all, central to the job of being a CEO or a member of the management team of a corporation is to act in the best interests of the corporation. The central duty of other employees is to obey the commands of their corporate employers, as formulated by the executives and senior managers as they act in the best interests of the corporation.

This duty to obey imposed on “ordinary,” “lesser” employees is a testament to the essence of their relationship to the corporation: it is a relationship in which they are to be subjugated; they are candidly characterized as the inferior party in their relationship with the capitalist who employs them. This is not true when it comes to executives and senior managers.

While legally, executives and senior managers do have a duty of obedience, it is most unlikely that, whatever their wrongdoing, they will be sanctioned for failure to obey a reasonable command issued by the corporate employer. In practical terms, what is to be done and how it is to be done are determined by those executives and senior managers. There are no specific orders to be obeyed. When it comes to operational matters, executives and senior managers are the operational guiding mind and will of the corporations which employ them. What this denotes is that there are concrete reasons why “ordinary,” “lesser” employees are treated differently to executives and senior managers, even though, in formal legal terms, they all are employees. Law makes it very clear that the relationship between capital and “ordinary,” “lesser” sellers of labour power is an adversarial one, an antagonistic one. This is not so when it comes to the relationship between executives / senior managers and their corporations.

At the core of managerial tasks is the obligation to get as much value out of each seller of labour power as possible. The legally imposed duties on all “ordinary,” “lesser” employees to exercise reasonable skill, to act in good faith, to be loyal, and, most importantly, to obey make that goal more easily achievable. Thus, as formally expressed in law, while the duties of “ordinary,” “lesser” employees read like those imposed on executives and senior managers, they are intended to attain different, indeed, opposed goals. The “ordinary,” “lesser” employees are assumed to be natural

enemies of their employers, and they must be constrained and tamed. This is done, primarily, by the executives and senior managers and the operational systems they set up. The legal enforcement of discipline by managerial personnel creates a hierarchical mode of production. This hierarchical organization makes it easier for executives and senior managers, aided and abetted by law, to help corporations to extract surplus value from the sellers of labour power. The corporations and these special employees, executives and senior managers, are reaching and striving for the same goals. Unlike “ordinary,” “lesser” employees, executives and senior managers are not in an adversarial position vis-à-vis their corporations; there is no ineradicable antagonism between them and their corporate employers. In part, this explains why there is so much reluctance to talk of executives and senior managers as employees, though they are that, and more about having a special relationship to the corporation, fiduciary or something like it, one based on trust, not on conflict.

This is what gives the legal provision that they are to pursue the best interests of the corporation meaning and content. This is what executives and senior managers are doing when they slash the workforce, or reduce wages or move some production offshore to lower costs. It is their *function* in a class-divided system of social relations, rather than their *legal* employment category, that makes them different and which explains why they are treated so differently, why they are accorded so much respect by conventional society. From this perspective, the huge disparities in remuneration of executives / senior managers and “ordinary,” “lesser” employees are neither here nor there. The dominant class is to be rewarded at the expense of the subordinated class.

From the corporate employers’ point of view, the huge disparities in remuneration between their executives and senior managers and the “ordinary,” “lesser” workers are not seen as obscene or unfair, per se. It is only a problem for the real owners of capital when these representatives of capital use the huge powers delegated to them to feather their own nests at the expense of the corporation. This concern arises when the executives and managers reduce the amount of surplus value their employers might expect executives/managers to generate for them. Which turns out to happen quite often. The twists and turns of corporate law have created conditions which put executives and senior managers in a prime position to take advantage of

their employers. Thus it comes to pass that, on occasion, “ordinary,” “lesser” workers find themselves on the same page as aggrieved shareholders. But workers merely get to voice their ire; shareholders are given some legal remedies.

### EXECUTIVES AND SENIOR MANAGERS AS DANGERS TO CORPORATE PROFITS

That executives and senior managers were likely to exploit their bosses’ passivity was forecast by Adam Smith. His model for an efficient economy was one in which all individuals use their personal talents and resources to compete with others like them as they pursue their self-interests. The key to this model was his firm conviction that naked self-interest made individuals the best-placed people to make decisions about what to do with their talents and resources. No one else could be as focused on their special interest. It followed that Smith took a dim view of the tendency to form companies. After all, they were vehicles to which individuals surrendered their resources. Legally, they turned their property over to another person, the company. It, in turn, not having a physical mind or a body, needed a management team to determine how to deploy the aggregated resources it now legally owned. Neither the company nor its managerial personnel would be as concerned with the contributing capitalists’ welfare as they themselves would have been if still personally deploying the capital they had entrusted to the company.

As well, Adam Smith believed that not only would the managers of a company be less single-minded than the original owners of the now-aggregated capitals, but also that they would be seriously tempted to further their own interests, rather than those of either the company or the original contributors of capital. Famously he wrote that using the company as a vehicle to advance a market economy should be a last resort. It would only be appropriate if the tasks to be done were easily routinized and would not involve giving the non-owning managers much discretion at all, that is, cases in which large capital needed to be amassed but little innovation or risk-taking was envisaged. His examples of boring, capital-intensive enterprises were “first, the banking trade, secondly, of insurance from fire, and from sea risk and capture in time of war, thirdly, the trade of making and maintaining a navigable cut or canal, and, fourthly, the similar trade of bringing water for the supply of a great city.”

While Smith's reliance on the invisible hand of the market remains *the* powerful concept which dominates economic and political thinking to this day, his caution, namely, to be wary of placing reliance on the company to create overall welfare, has had little traction. The corporation (the modern form and name of Smith's "company") is central to the working of contemporary capitalism. It is a preferred vehicle, as it provides great protections from risk for investors (shareholders enjoy limited fiscal liability and personal legal immunity for corporate wrongdoing) and, in large part because of this, is capable of bringing huge amounts of capital together.

By 1932, Adolf Berle and Gardiner Means noted that individual owners of capital who had chosen to contribute some of their wealth—another boon provided by the corporate form is that owners of the means of production can diversify their risks by investing in many profit-seeking firms simultaneously—effectively lost the right to decide how that wealth should be deployed. This right was now nominally vested in the corporation, but was actually left to be controlled by the board of directors and the executives and managers it hired. This observation raised an alarm. Ownership without control and the obverse, control without ownership, undermined the individual competitive market capitalist model. It was not as it should be.

Of course, this acknowledgement that Adam Smith might have been right came as a massive economic depression had taken hold. By 1929, as the crash came and so many investors in corporations (and, of course, millions of people who only had their labour power to invest) lost their wealth, it was revealed that, for some time now, executives and senior managers had been raiding the corporate coffers. US congressional investigators uncovered widespread insider trading (that is, taking advantage of knowledge to which investors were not privy), stock price manipulations (taking advantage of being able to cause the share prices to move up or down), and simple diversions of corporate funds for personal use (taking what was not theirs). As it was by now unthinkable that capitalism practised by means of corporations was to be jettisoned, regulators sought to make it more difficult for executives and senior managers to use their control over other people's money to their advantage. In 1933, the *Securities Act* was passed in the US (similar legislation was

enacted in other jurisdictions some time later). The Act demanded—and still does—that corporations that issue shares as a means to attract capital inform potential investors about anything that might affect their investment. The idea was—and is—to offset the real (contrast the legal) owners' loss of control over their property. As well, insider trading and share price manipulations were outlawed. It was, in historical terms, not long before these measures turned out to be ineffective and executives and senior managers arrogated more power for themselves.

As World War II ended, corporations became ever larger, especially in the US. In part, this is a natural outcome of competition: some people win the competition and concentration allows the winners to grow and grow. Publicly traded corporations became increasingly attractive to investors. At the same time, as the numbers of investors in corporations increased, it was apparent that one of the US responses to the 1930s debacle, the enactment of the Glass-Steagall Act in 1933, had forced banks to make a choice. They had to nominate themselves as commercial or investment banks. If they took the commercial option, they had to restrict their investment in equities. If they decided to be investment banks, they would lose a great deal of their capacity to accumulate depositors' money. As up to that time, banks had put some of their more active directors on boards of directors who could fetter the conduct of executives and senior managers, the choice many made to be commercial banks, combined with the increasing number of more passive investors, gave the executives and senior managers more room for manoeuvre. There simply were less people eager to direct them as they exercised their discretionary powers when deploying the corporation's assets.

Thus it was that the post-war years gave rise to what, in the corporate literature, was dubbed the managerialist period. It led to rather wistful hopes that, as corporations got bigger and bigger, the executives and senior managers would use their discretionary powers to do good, to have corporations act in the interests of the public at large, of stakeholders, rather than just shareholders, to be socially responsible. While these pushes had many cheerleaders, they rarely had many concrete successes. It is accurate to say, however, that remuneration for executives and senior managers stayed within bounds that did not raise hackles in the way that they do today. The rewards for executives and senior managers were large, but they

were tied to the size of these ever-growing corporations. Executives and senior managers therefore tended to push for growth in size, rather than emphasize short-term profits.

All this was part of the gilded period for capitalism, especially in the US. But, as has been outlined in earlier chapters, Les Trente Glorieuses came to an end as the 1960s faded away. Corporate profits were on hold, and political power was increasingly perceived as having to be shared with the working class. Capital went on a counterattack. Intellectual gatekeepers, led by Milton Friedman and Henry Manne, led a vigorous assault on the corporate social responsibility movement. This academic assault assisted capital as it set out to diminish working class power and to undo as much of the recently enriched social wage as possible. As the corporate class pushed for conditions which would allow for more efficient accumulation, individual capitalists also insisted that the corporations become better at maximizing profits. They, too, were helped out by scholars. These scholars furnished an academic platform which took off from Adam Smith's caution about the dangers of separating ownership and control: they argued that executives and senior managers should be brought under control. The question was, under whose control?

In a piece which made them quite famous, Michael Jensen and William Meckling argued that, even though shareholders (and bond holders) were not the juridical owners of the corporation's assets, as the providers of capital, they should be treated as the "real" owners. This, Jensen and Meckling maintained, was the functional reality of a market capitalism that relied on the corporation as a vehicle for its workings. To the authors, these real owners' interests were the ones to be advanced by the executives and managers employed by corporations. Inasmuch as executives/managers were perceived to fail to do so, they should be held to account, to be disciplined by the real owners.

The shareholders should be seen as principals who had employed agents to look after their interests. To see the investors in corporations as principals who may be badly served by their agents, the corporate managerial team, was, legally speaking, an arresting idea. What this approach signals is that the duties owed by executives and senior managers are not fiduciary ones, but contractual ones, albeit that the incidents of the contract may have some of the same incidents as a fiduciary relationship might impose. Unlike

beneficiaries under a pure trust relationship who are given the protection of law by old equity principles, contributors of capital to a corporation should use their contracting power to avert failures or abuses by their agents, executives, and senior managers.

Jensen and Meckling—by making the creation of value for the shareholders the end-all and be-all of executives' and senior managers' duties, by establishing the prioritization of shareholders' interests as *the* goal of corporate management—had given shareholders a rationale for taking action on their own behalf. They should re-establish their legal privileges as "real" owners. This logic spawned a new breed of quick-buck artists. By the 1980s, raiding had been made respectable.

A number of investors looked around for large publicly traded corporations whose share price they felt to be undervalued, that is, whose shares as valued by the market would be higher if its assets had been used more efficiently. They would buy shares, often relying on borrowed money, putting themselves in a position which allowed them to issue a credible threat that they could become dominant shareholders. In this inhered another threat: if they came to control the bulk of the voting power in the corporation, they would use it to get rid of the directors, executives, and senior managers whose indifferent efforts had led to the undervaluation of the corporation by the share markets. They threatened jobs. Executives and senior managers were facing the ultimate and most dreaded fate of all "ordinary," "lesser" employees: the sack.

### EXECUTIVES AND SENIOR MANAGERS FOUGHT BACK WHEN ATTACKED BY "PREDATORS"

As this book has noted, again and again, when workers' jobs and conditions are under pressure, they fight back. Executives and senior managers, behaving like imperilled employees, fought back. But they had better tools than "ordinary," "lesser" workers have. They had daily control over the corporation's direction and used it to good effect. They would try to persuade the shareholders not to sell to the raiders, claiming that raiders did not have the interests of the corporation at heart and that, should the raiders succeed, the raiders would undoubtedly have to reduce many of the corporation's activities to allow them to repay the debts they had incurred to buy the shares. Among other things, this would lead to the sacking of many

employees. It is somewhat piquant to see that, when their own jobs were on the line, these executives and senior managers exhibited a great deal of empathy for “ordinary,” “lesser” employees. It is piquant because executives and senior managers were, as noted, often munificently rewarded for ridding the corporation of workers in droves.

The executives and senior managers—claiming, then, that their main consideration was for the long-term good of the corporation—would recommend that existing shareholders reject the premium the raider was offering them for their shares in its pursuit of a hostile takeover of the corporation. But the executives and senior managers did not just rely on appeals to reason and sentiment. They, and a host of professional helpers, particularly high-flying lawyers and accountants, crafted imaginative defensive tactics.

One such plan was to create a “poison pill.” The idea was that, should a potential raider manage to amass a set proportion of the outstanding shares, say, 15 percent of them, existing shareholders, but not the bidder wanting to take over the corporation, were given an opportunity to buy shares at a considerable discount. This would make it much more expensive for the raider to get the number of shares needed to complete the takeover. The language tells much about the way in which the contesting forces saw their relationships. The investors bidding for dominance in order to make the corporation more effective were known as raiders; their bids were known as hostile bids; the defence tactic was known as a shareholder rights plan, a defence for virtuous capitalists against marauding raiders. Raiders were to be made to swallow a poison pill. Executives and senior managers were likely beneficiaries if the bid was stopped in its tracks: they would retain their positions. Still, they were worried because, despite all these clever and strenuous efforts to ward off raiders, there was always a real possibility that the shareholders would welcome a bid from a raider willing to pay them a premium for their shares. The frightened executives and senior managers frequently had the corporation help them install a Plan B.

Executives and senior managers fought for contract arrangements which would bestow a golden parachute on them or, at least, extend them a golden handshake, should a hostile bidder succeed and dismiss them. The “golden parachute” was a deal which might include grants of stock options, cash bonuses, and generous severance pay should they be terminated by new

owners because of their perceived failure to maximize shareholder value. A "golden handshake" ensured a payment of severance pay upon such rude termination, and it might include the severance pay which would have been awarded upon the normal retirement of the executive or senior manager. Obviously, both these kinds of arrangements worked like the poison pill in that they greatly increased the cost of taking over a corporation and getting rid of the allegedly inept management. Equally obvious is the fact that "ordinary," "lesser" employees do not have the contractual wherewithal to build such safeguards into their contracts of employment. More, the language of "golden" parachutes and handshakes is telling: the struggles for the threat to their jobs, spurred by theorists focused on giving property owners more control, led to an enrichment of the executive and senior manager class. The very discretion which gave rise to the anxieties about their clout and possible inefficiency had put them in a position to take advantage of the greed of the so-called raiders.

And they had many opportunities to do so, as the number of raiders had multiplied. Some became celebrity raiders. Names such as T. Boone Pickens and Carl Icahn aroused fear in the executive suites. Wall Street firms which lent money to fund these raiders, most notoriously Kohlberg Kravis Roberts, and Hicks Muse, had much to gain by facilitating and promoting them. During the 1980s, just under half of major public US corporations received takeover offers, forcing more and more executives and senior managers to push for poison pills and golden parachutes. It turned out that reliance on market remedies, recommended by the likes of Jensen and Meckling who wanted real owners to take charge, had not yielded the results anticipated. A new way had to be found to overcome the difficulties left by the separation of ownership and control.

## EXECUTIVES AND SENIOR MANAGERS: FROM LEGAL EMPLOYEES TO FUNCTIONAL CAPITALISTS

Michael Jensen, combining with another academic, Kevin Murphy, came up with another analysis. Once again, the difficulty as they saw it was that the principals, the shareholders, could not exercise sufficient control over the executives and senior managers. In part this was because it was too hard to see, in any one circumstance, what executives and senior managers ought to do to maximize returns for shareholders. Information was asymmetrical,

and the shareholders could not insert contract terms (virtual or implicit contracts, of course, because legally there are no such contracts between shareholders and the executives and senior managers who are employees of a separate legal person, the corporation) which would allow them to take action when their agents did not perform adequately. What was needed was a tool to remedy this market imperfection. This led to the idea that, if the executives' and senior managers' interests coincided more closely with those of the shareholders, they would, as self-interested people, not pursue goals which would be satisfied at the expense of the shareholders.

The basis was laid for an argument that more of their remuneration should consist of bonuses and/or options to purchase shares. As the problem had not been solved by threatening the executives and managers with something like the nasty kind of discipline faced by "ordinary," "lesser" employees, hostile raiders were to be replaced by a sweetening of the pot which the executive and senior manager class could dip into. Now carrots were to be waved in front of executives' and senior managers' noses to do what they should always have been doing as loyal employees, should have been doing as decent agents looking after their principals. Unsurprisingly, executives and senior managers liked this idea and adapted it to their advantage.

The payment of bonuses for work well done or the granting of options were not unknown before this new contract-based (contrast fiduciary-based) theorizing took hold, but it had not been a major method of remunerating executives and senior managers. Right through the 1960s and 1970s, executives/managers were mostly content with hefty cash payment by way of wages. They were remunerated in much the same way as "ordinary," "lesser" employees were, only better. As late as 1980, fewer than one-third of CEOs in the US were granted any stock options. By 1994 (perhaps not so coincidentally, four years after Jensen and Murphy provided a respectable justification for aligning shareholder and executive interests), 70 percent of CEOs of major US public corporations had about half of their pay packet made up by options which grew ever richer, attracting the label "mega-options." Out of a sample of 200 CEOs compiled by an executive compensation consulting firm, 92 received such mega-options, averaging $31 million in value. The pursuers of egregiously excessive compensation had been given a dose of steroids.

John Kenneth Galbraith documented that, in 1980, CEOs of the 300 largest US corporations had incomes 29 times the average of manufacturing workers. By 1990, their take had increased to be 93 times greater than that of average employees. And, as seen at the beginning of this chapter, currently CEOs' incomes hover around 200 times greater than average workers' incomes. Note here that, although these phenomena took off in the US, they have been replicated in the Anglo-American sphere. It is easy to see why these gigantic leaps in remuneration bred, and continue to breed, resentment in workers. But not just workers are annoyed.

It has become apparent that the new ways of paying executives and senior managers, so as to have their interests and those of shareholders coincide, have not led to better outcomes, either for corporations or for their shareholders. This was plain by 1994 when James Collins and Jerry Porras published *Built to Last*, and was reaffirmed by Collins in 2001. In his *Good to Great*, Collins stated quite categorically that the idea that the structure of executive compensation was a key driver of corporate performance was simply not supported by any data. More recently, Gideon Haigh reported that, in Australia (illustrating that the US tendencies have taken hold in the Anglo-American sphere), sharp CEO salary inflation was associated with after-tax returns on equity in one thousand businesses being halved. Earlier, in 1999, a *Harvard Business Review* article had not only shown that there was little linkage between increased executive pay and corporate performance, but also, even worse, that "senior managers are rewarded even when their companies underperform." On July 10, 2019, the *Toronto Star* reported that, particularly in banking and finance, executives and senior managers were making out like bandits as their shareholders lost big-time. Richard Handler, the CEO at Jefferies Financial Group, doubled his income to $44.8 million, while shareholders posted a negative return of 14.9 percent; James Dimon, at JPMorgan Chase, saw his wage go to $30 million, up by nearly $2 million while the bank's shareholders had a 6.9 percent negative return; Timothy Sloan, the CEO of Wells Fargo (until forced to step down because of alleged improprieties) received a 4.9 percent raise, making his remuneration package worth $18.4 million as shareholders saw their shares devalued by 21.8 percent; and so on, and so on. The attempt to fashion a greater coincidence of interests between executives and senior managers was not working out as planned. This raised the ire of capitalists

and their fellow travellers. As early as 1992, John Kenneth Galbraith noted that “the more than ample compensation that regularly accrues to the senior executives and is sanctioned by acquiescent management-appointed directors is further evidence of the elasticity of market discipline.” As things got worse, rather than better, the language became ever more derisory and colourful. In 2003, imagining a place she called CEOville, Arianna Huffington, co-founder of the Huffington Post, pictured what its Declaration of Independence might proclaim: “All men are endowed by their creator with certain inalienable rights, that among these are stock options, golden parachutes, and the reckless pursuit of limitless wealth.”

The plan to stop executives and senior managers who have effective control over the ways in which corporations operate from using their control to serve themselves rather than shareholders had backfired. And it had done so because, at its core, the plan demanded that the executives and senior managers, more than ever before, should embrace the notion that, to serve the best interests of the corporation, they were to do everything in their power to increase the value of the shares being traded in the stock markets. Executives and senior managers could now benefit enormously from doing their job if they owned shares in the corporations they ran. What they needed was to have their remuneration packages designed to make this possible. One step, as the Galbraith passage above indicated, was to have executive compensation consultants persuade the corporation to tailor the remuneration package to best suit those executives’ and senior managers’ potential to do well. Differing positions in the market might require different formulas. A retired CEO, Edgar S. Woolard (who became the chair of the New York Stock Exchange) explained how this was engineered. The board of directors of a corporation would set up a compensation committee which had the task of assessing the market for executives and managerial people in order to see how their own team should be rewarded. That committee would then talk “to an outside consultant who has surveys you could drive a truck through…. The outside consultant talks to the human resources vice president, who talks to the CEO. The CEO says what he’d like to receive. It gets to the human resources person who tells the outside consultant. And it pretty well works out that the CEO gets what he’s implied he thinks he deserves.” This cynical account was borne out by methodically collected data. This circular, self-serving system of creating

pay package formulas was what drove Graef Crystal, one of those outside compensation consultants, indeed a highly successful one, to despair. He set out the mechanics of how packages were constructed in his 1991 tell-all book, *In Search of Excess: The Overcompensation of American Executives*. The unprincipled machinations it described caused a sensation, but, as the increasing size of executive and senior managers reveals, that did not lead to much effective reform.

The formulas of which Crystal and his adherents complained favoured remuneration packages with less cash and more bonuses and the right to buy options. On the options front, executives and senior managers were given the right to exercise their options to buy shares at a price set earlier, known as the strike price. If shares went up, they would make a handsome profit by exercising their options at the lower strike price. Bonuses for increasing the price of shares also helped their cause. Executives and senior managers inevitably came to be fixated by share prices, rather than the long-term viability of the corporation or the well-being of all those whose welfare depended on it. I will not, in this chapter, concerned as it is with the treatment of some very special employees, speculate on what kind of larger economic impacts this narrowed view might have on the setting and attainment of corporate goals, but obviously it has some. Instead, the focus is on how some employees, having been given the tools to do so, have become intent on pursuing their own interests at the expense of everyone else's. Their scheming has been aided and abetted by a host of professionals and parasitic agents.

What executives and senior managers need is a relatively low strike price, so that any improvement in the value of a corporation's shares will benefit them. It turns out that the options-to-purchase agreement can be varied as needed. If a corporation is about to release good news, the options may be offered just before the shares' values are likely to increase at a strike price that is below that expected value; if bad earnings reports are about to be disclosed, the grant to any right to purchase an option may be delayed until the value of the shares has dropped. As if to add insult to injury, in some cases in which the share values fell, corporations have been induced to reduce the strike price, safeguarding executives' and senior managers' pay packages from being stuck with options that had become a

losing proposition. It has become a bountiful world for these well-placed corporate employees.

Another way to produce an increase in share value, ensuring that an option to purchase is a rewarding one, is to have the corporation buy back its own shares. When its own shares are bought by the corporation, they are cancelled, leaving fewer shares out there. The value of these remaining shares will increase as each one now will be entitled to a larger proportion of any profits earned (and a greater amount of any residual property, should the corporation go out of business). Any executive or manager who owns shares, or has an option to buy them cheaply, stands to profit. The decision to have the corporation buy back its own shares is often made or, at least, heavily influenced by the same executives and senior managers who stand to benefit. Frequently, to purchase its own shares, a corporation will borrow monies, another decision made or heavily influenced by far-from-disinterested executives and senior managers.

These schemes and schemings need to be legal and, therefore, implemented, formally at least, at arm's length. Enter the accounting, auditing, and legal professionals, who are handsomely rewarded to make all of this work. They have a real interest in the promotion of arrangements which help the executive and senior managerial class enrich itself. In addition, all those who profit from a boost in the performance of speculative share markets—financial analysts, brokers, underwriters, financial institutions, and banks—are well served by those in control of corporate assets making the maintenance and improvement of share prices the centre of their efforts. They are only too pleased to give very generous analyses of a corporation's performance and prospects and/or to support plans to buy back shares, making any options richer and bonuses fatter.

The take-away is that the very means used to rein in non-owning controllers of the corporations' assets and operations had been adapted by those non-owning controllers to increase their remuneration. The executives and senior managers have used the logic of alignment of their interests with those of the true owners to profit from heightened share values. Their legal characterization as employees is fading from view as their remuneration packages make them seem more like shareholders, like true owners rather than the employees of those owners. Indeed, all too often they fare better

than the “true” owners, because their combination of cash, bonuses, and options is rarely affected by their corporation’s actual performance.

Executives and senior managers are, of course, fully aware of the benefits they are reaping from the push to align their interests with those of shareholders. From their point of view, it has served them much better than their fear-driven responses to the raiders in the late 1980s and early 1990s. Then they designed tools to protect themselves as employees who might be discarded by a rapacious raider, such as the one depicted by Oliver Stone in his 1987 film *Wall Street*. In a famed speech, the ruthless raider Gordon Gekko notes that the typical corporation’s main characteristic is survival of the unfittest and that only tough ownership assertiveness can cure the problem. He styles himself as a liberator of corporations by turning shareholders into insurgents. It is time to act on shareholders’ greed: “Greed is good … greed is right, it works … it terrifies.” Poison pills and golden parachutes were the defensive tools deployed by terrified employees. That was then. This time around, however, having been offered a bigger share of the shareholders’ pie to seek to placate them, executives and senior managers are the ones who assert themselves and continue to do so. They are not acting out of fear. They have taken charge. They are the ones who, like T. Boone Pickens and Gekko, satisfy their greed. They have found a magical formula and they know it.

John Coffee Jr. reported for the US think tank Economic Policy Institute that, in 1990, 92 percent of executive remuneration consisted of cash and only 8 percent of equity, that is, shares. By 2001, after the raider period and its hostilities and poison pills had waned, and the alignment of executives / senior managers and shareholders had become the goal, the remuneration packages featured 34 percent cash and 66 percent equity. Unsurprisingly, as this new circumstance took off, between 1988 and 1992 the size of the packages soared—by a staggering 150 percent for the median CEO of Standard & Poor’s corporations. Equally unsurprisingly, executives and senior managers remain enamoured of being paid in these ways. They have been recipients of a veritable bonanza: between 1978 and 2019, CEO compensation in the US grew 94 percent.

These steady and stupendous increases are part of the surplus value which corporations have exacted from their workforces. What has happened is that, much to the chagrin of many shareholders, their executives and

senior managers have been paid as if they are more like shareholders, more like capitalists, rather than mere highfalutin employees/agents of capitalists. It is becoming ever more clear that most of the executives' and senior managers' remuneration is not a return on their human capital which they have invested, that is, it is not so much labour income as it is a return on capital which was invested by their "employing" corporations. The corporations' goal was to appropriate as much as possible of the wealth socially produced by "ordinary," "lesser" workers. Executives and senior managers now are joint exploiters, joint capitalists, even as, legally, they are not owners of the means of production.

## SUMMATION

1. All corporate employees, regardless of their position, owe it to their employer to serve its interests. Law imposes a series of duties on all of them toward the attainment of this end. An essential component is that workers be coordinated as they produce value for their employer and that they obey the coordinators' demands.
2. As a corporation is a legal vehicle created to allow investors to pool their resources in order to seek profits, the corporation, as a bodyless and soulless owner of these pooled resources which employs the workers to chase profits, relies on some employees, that is, on on-the-ground executives and managers who have been given a set of general policy guidelines by a board of directors. They are to deploy the assets and employees of the corporation. Their task as employees is to coordinate and command the rest of the workforce.
3. While in theory, then, these executives and senior managers are under the control of the corporate employer, as are all other workers, it is very difficult to control them. This soon led to the realization that Adam Smith had been rightly worried about the possibility that these executives and senior managers might abuse their control over the assets and operations of the corporation and act more in their own interest than in that of the corporation.
4. Pious, legally endorsed declarations were therefore made to the effect that these special kinds of employees really owed a different level of duty to their employing corporation than did other workers, than did "ordinary,"

"lesser" workers. Fiduciary and fiduciary-like standards of obligation should be honoured, inhibiting them from taking advantage of their position. This sounded good, but it never made much sense legally and the brakes on the use of discretionary powers by executives and senior managers were not very effective. So a different approach was urged during the period I have been referring to as Les Trente Glorieuses. Executives and senior managers were urged to use their discretionary powers to serve the general good, rather than maximizing profits for a particular corporation. As the period ended, so did this hope. It was clear that the logic of capitalism was not going to allow executives and senior managers to become more like public servants, more like social engineers, than servants in the employ of profit-seeking individual investors.

5. The capitalist class and its intellectual gatekeepers reminded everyone that executives and senior managers were legally employees of a corporation and functionally agents of the true owners of that corporation, the shareholders. This encouraged aggressive investors to identify corporations that were not efficiently run (as Adam Smith had said they would not be) and threaten the executives and senior managers with dismissal—just as if they were "ordinary," "lesser" employees. The executives and senior managers responded by making it costly to attack them in this way. Raiders were met by poison pills and serious payout costs. As general economic circumstances made these very confrontational and unpleasant strategies less efficacious, investors turned to make allies out of their executives and senior managers. They gave the executives and senior managers a chance to become more like the "true" owners of the corporation. Executives/managers have moulded this opportunity to suit them extremely well. Their wealth and powers have increased.
6. Executives and senior managers are essential to a corporation's operations. Unlike "ordinary," "lesser" essential workers, they are rewarded for their efforts because they have control over more than their personal capacities. This control puts them in a hybrid position. They are concurrently legal employees and functional participants as they operate the corporation in the best interests of shareholders and, as well, beneficiaries of portions of the surplus value they are hired to extract. They are in a class of their own.

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PART V

# *The Disposable Worker*

Wherein it is shown that neither the physical well-being which workers need to have protected, nor their very human need to be accorded dignity or respect, are safe from law's promotion of capitalism's agenda. Once again, it becomes clear that, while law gets and maintains its prestige as a relatively autonomous institution by purporting to treat like situations alike, it frequently fails to do so. When it comes to the regulation of work in a capitalist society, this failure becomes most apparent when the way in which law allows workers to be treated as mere equipment to be used and discarded by profit maximizers is examined. Neither the physical well-being which workers need to have protected, nor their very human need to be accorded dignity or respect, are safe from law's promotion of capitalism's agenda.

CHAPTER 11

# *A legal right to maim and kill workers*

Workers enter into work-for-wages contracts to get an income in order to live. They know that, for the time that they are at work, they are handing some of their personal capacities—their physical and intellectual attributes and skills—to their employers to dispose of as those employers see fit. Their hope is that they will return home with all their capacities intact, back under their control. All too often this modest aspiration is not met. Many workers are injured and killed or felled by occupationally related diseases. Many die prematurely.

How and why is this allowed to happen? I begin with an account of a Canadian occupational health and safety tragedy which occurred in 2001.

Among its many interests, a large corporate group, whose parent corporation was called Brascan, constructed and maintained electricity lines. The specific member of the group charged with this particular task was Great Lakes Power Corporation. To carry out part of its task, Great Lakes Power had hired a contractor, named Neat Site Vegetation Experts. Its job was to fell trees around Great Lakes Power's electricity lines. Great Lakes Power had established safety regulations which it was to monitor and with which Neat Site was to comply. Lewis Wheelan, a Neat Site employee hired to clear vegetation, had only been on the job for two days when, because of the two corporations' disregard for their own safety rules, a broken electricity line fell on him. He lost all but one of his limbs and suffered serious burns all over his body. He made herculean efforts to rehabilitate himself with the help of his activist father. He had reached a stage where he could live by himself with the help of a part-time attendant. Then he was struck by an unrelated disaster.

There was a massive blackout in parts of North America. The day on which this power outage began was a very hot one. Wheelan's condition required him, because of the severe burns he had suffered, to have a cool physical environment. That day, Wheelan's attendant was not scheduled to be with him. The totally unexpected power blackout meant the air conditioning stopped functioning and there was no one to help him out. Wheelan died shortly afterward, alone.

A few weeks later, after the regulators had dropped charges against senior managers, Great Lakes Power Corporation and Neat Site Vegetation Experts pleaded guilty to having violated the occupational health and safety statutory duty requiring them to give proper instructions to employees. The fine was $260,000. Wheelan's immediate supervisor was charged with other safety violations, specifically, ensuring that an area be cleared when tree-cutting takes place and to use guy ropes when trees are being felled. He was found responsible but only rapped on the knuckles—18 months' probation, 100 hours' community work, and forced to write a letter which described what lessons he had taken away from all this. He also was to make a $500 donation to a burn clinic. The judge acknowledged that these punishments were lenient. He justified the leniency by noting that it was evident that Great Lakes Power had failed to instill a culture in its employees which emphasized the need to foster a safe workplace.

The elements of this story are replicated in a variety of ways every working day. Chapter twelve lists a number of instances where these elements combine to endanger huge swaths of workers. In essence, these examples reflect the overall disregard for the safety of human beings who need to work for a living and a high degree of solicitude for those who might be thought responsible for the slaughter in the workplace. For slaughter it is. The ILO has reported that, worldwide, there are some 260 million physical injuries inflicted on workers every year, 160 million suffer occupationally related diseases, and 2.3 million die of their injuries or diseases every year. To put it more dramatically, 6,000 workers die every day because they went to work. In Canada, if we count people who died prematurely because of occupationally related diseases, 5 workers are killed at their workplaces each and every day. The toll is greater than that exacted by most wars.

Defenders of the system of production which leads to these shocking results reject the notion that they should be described as slaughter. This kind of language suggests that hurts are being inflicted intentionally or, at least, that governments and the employing class are indifferent to the plight of the working class. This, it is said, belies the many efforts made to ameliorate working conditions, at least in the Anglo-American jurisdictions on which this book focuses. Defenders of the system bolster their argument by noting that risk is inevitable when capital, people, materials, substances, and mechanical processes and equipment come into contact with each other. Then, having established what they believe to be a law of nature, they refer to major policies which seek to offset some of the burdens of the harms actually experienced and which attempt to prevent risks from materializing. These policies are depicted as signs that there is no malevolent intent, that no one is indifferent to the harms associated with wealth-generating production.

A statutory scheme, usually called workers' compensation, provides injured workers with medical and rehabilitative care and replacement of lost income. In addition, there are regulatory regimes, more often than not called Occupational Health and Safety Acts. They set up administrative agencies which develop minimum standards of safety which must prevail in workplaces; they monitor compliance with these standards and sanction people who violate the standards. No indifference here. It does seem as if giant steps have been taken. Occupational health and safety is much better protected that it was in the early stages of capital relations of production, as it now covers almost everyone who works, not just a few. There is no lack of good intentions, say the defenders of the system.

This is true in the sense that the earlier legal treatment was more obviously anti-worker than the now-prevailing systems of protection and prevention.

## EARLY PURISTS' LEGAL LIBERALISM: GOOD FOR CAPITALISTS, CRUEL TO WORKERS

In his 1840s study, *The Condition of the Working Class in England*, Friedrich Engels reported on the ways in which the Industrial Revolution had made lives worse for the working class. His harrowing descriptions of domestic lives, of rampant and killing diseases, and of brutal oppression of, and disregard for, workers' welfare in the rapidly multiplying factory

settings turned the book into a classic. Engels was not the only one who took note of worsening social conditions. There were official reports on the plight of children and women (see the discussion in chapter two) and male workers in mining and factory settings. Church leaders, novelists, and others who saw themselves as defenders of public mores activated for some relief, some reform. As early as 1808, horrified by a steam-engine-driven flour mill and its displacement of independent flour millers and by the deprivations suffered by increasingly insecure workers, William Blake penned his "And did those feet in ancient time" poem. Today, set to music by Hubert Perry, the poem is seen as an emblem of patriotism or nationalism. But that is not what Blake intended. His poem called for a different system of social relations and advocated militant opposition to the dangerous and novel anti-social modes of production:

*And was Jerusalem builded here,*
*Among those dark Satanic Mills …*
……
*I will not cease from Mental Fight,*
*Nor shall my sword sleep in my hand:*
*Till we have built Jerusalem,*
*In Englands green & pleasant Land.*

It was not only critics of fast-maturing capitalist modes of production and well-intentioned people who expressed their concerns. Some employers who stood to gain from the new dawn the Industrial Revolution had brought began to worry that the hapless state of the working class might create political and economic difficulties for their overall project. They feared that, unless, as a class, they exercised some restraint, it might become difficult to maintain a stable, healthy, and competitive labour market.

Despite all this awareness of social degradation and anxiety about the morality and efficacy of it all, reformists found the going hard. There was one major institution that stood firmly in the way of reform. It was the common law and the judges who interpreted and applied it.

The courts remained committed to what they perceived to be the fundamental principles which kept society together. One central plank of their vision was that it was crucial to treat all individuals as equally

sovereign when it came to politics and law, regardless of their differing economic strength. Committed to this principle, the courts endorsed and embedded the notion that, should individuals enter into a contract where one of them agreed to provide work to the other in return for wages, both parties must be treated as having exercised their untrammelled free will. Respect for their autonomy required the courts to hold that the parties assumed the known and unknown risks of entering into these contracts. Neither party could come to court afterward, therefore, to ask that the burden of a materialized risk which impinged on one party be shifted onto the other party. The parties to a contract were assumed to have voluntarily assumed the risks of entering into a contract for work for wages. It was their problem, no one else's. The assumption on which this doctrine was founded was so absurd that the judges gave it a Latin tag to make it sound ancient and unimpeachable: *volenti non fit injuria*. This did not make it any less absurd.

The fact that so many people were bleeding, suffering, and dying because their circumstances had *forced* them to enter into unregulated work-for-wages contracts did not shake the judiciary's firm belief that workers entered into the contract *freely*, as sovereign individuals who had knowingly agreed to bear the burden of any risk this entailed. Indeed, as time wore on, the judges doubled down. They ruled that, should injured workers seek to blame fellow workers for injuries suffered and, thereby, make the employer which had hired such blameworthy fellow workers liable to them, they should fail. Having voluntarily assumed all the risks of any contract into which they had entered, they were to be assumed to have taken the risk of negligent fellow employees. Presumably they could have checked them out and refused to take the risk of working with such dangerous folk.

If all this reads as if the common law and its functionaries lived on their version of Fantasy Island, it is to be remembered that they were focused on embedding principles based on an idealized view of liberalism. They saw this as their historical task, even if it made many people uneasy. The unease, of course, was aroused because these high-minded liberal principles turned out to be well suited to promote the more mundane and profane goals of capitalist relations of production. The "hands-off" private-

agreement-making mantra facilitated the extraction of surplus value from the working class, at great cost to workers' health.

The shocking outcomes of unfettered contract-making cried out for reforms. Throughout the 19th century, legislative protections were established. It was easiest to find support for regulatory controls if they were aimed at relieving the hardships of those who manifestly were ill-equipped to enter into contracts as sovereign individuals: children and women. As well, recurring bad outcomes in particular settings pressured governments into providing rules and standards which took aim at those outcomes, one by one. Typically, the Factories Acts provided standards meant to make all the newfangled machines safer, to improve the layout of the spaces in the factories. Similarly, preventive statutes were enacted in respect of boilers, vessels, specific aspects of mining, machine guards, requirement of scaffolding, the shoring up of trenches, the provision of ventilation, and the like. Each of these regulatory innovations was a response to the accumulating data about workplace injuries inflicted in specific circumstances.

Let me pause: it is useful to review what this briefest of historical sketches reveals.

First, the starting point of common law was that private actors should be left alone. This meant that the launching of a profit-seeking undertaking should be treated as innocent, indeed laudatory, conduct. When harms resulted, they were perceived as having been innocently inflicted. Nothing needed to be done. Only if there was sufficient repetition of similar conduct leading to similar harms which, in turn, led to despair and poverty among workers and sympathy and anxiety among some of the elites, did it become possible to pressure governments into intervening with the pristine free contract model. They did so as minimally as it was politically possible to do.

Second, the starting position reflected in the common law's principles denoted that enterprises could start up without checking whether there were any hidden risks for workers. This starting point suits capitalism but the outcomes often lead to curbs. Thus, people anxious about the quality of their waterways are unlikely to find sympathetic listeners among policy-makers until a beach is covered in dead fish; the notorious tobacco industry, similarly, was permitted to pile up bodies for decades ere it acknowledged

that its products, used as intended, were, and had always been known to them to be, toxic. In a system which worships profit maximization, profit-seekers are not asked to think before they act. In the same way, “wait and see” to find out what happens to workers was the logic of law and, of course, of its support for profit-seeking owners of the means of production. It is significant to stress that the major contribution which workers made to build up the pressure for amelioration was the bodily harms they suffered. They were the canaries sent into workplaces to determine what risks are to be averted, much as coal miners used caged canaries (more sensitive to poisonous gases than human beings) to test for lethal carbon monoxide. The links between capitalist logic, legal thinking, and the high injury, disease, and fatality rates of the 1800s are clear.

Third, these starting positions go some way toward explaining why the government interventions, when they came, were narrowly targeted. There was a need to offset a particular set of problems which had become too severe, too obvious, too delegitimating. The highly visible problem was addressed, the universal problem remained unacknowledged.

Fourth, the main form of intervention was the criminalization of behaviours which violated newly set standards. Inspectors were appointed to investigate workplace practices and were asked to bring prosecutions. Stringent adherence to this policy was soon found wanting. Given the enduring belief that profit-seekers’ initiatives were natural and desirable, it was difficult for governments and their inspectorates to think of violators as criminals. Here it is to be remembered that the law had historically set its face against criminalizing the endeavours of the dominant class. The Master and Servant Acts, which remained in force well into the late 1800s, had made it a criminal offence for servants to breach their duties, but only gave workers a civil remedy against employers in breach of their obligations. The dominant class, both in feudal and capitalist times, was not to be subjected to criminalizing legal sanctions as were others. Kit Carson, in his groundbreaking studies of the early British Factories Acts, showed how quickly the inspectors began to define their principal role to be the education of violating employers in order to persuade them to do better, not the imposition of legislated-for punishments. This dovetailed with what Carson and scholars such as Vilhelm Aubert came to describe as the true nature of these early criminal laws enacted to control workplace heath and

safety. While the laws did provide standards, the standards were intended to be signposts guiding behaviour rather than treated as rules of conduct written in stone. They were intended to relieve the plight of workers, but not in such a way as to undermine the maintenance of those principles and practices that upheld the structural needs of the newly emerging modes of production. Carson's analysis shows how the Factories Acts (and the many other specifically tailored interventions) played a role not only in protecting some workers but also in stabilizing competition between employers. They did so by the imposition of costs that kept out some of the more merciless competitors, costs that were more easily borne by the more dominant firms. Simultaneously they saved capitalists from themselves as the new standards/signposts helped maintain a larger and more compliant labour force. In Carson's famed phrase, the 19th-century interventions, while they looked as if they criminalized harm-causing employer conduct, produced a regulatory scheme whose true nature was one of "institutionalized ambiguity." A peculiar category of legal administration had evolved, one which straddled a space between civil and criminal liability. It allowed, indeed, functionally required, that a balance be struck by standard setters and enforcers. The vigour of worker protection was always to be set off against the needs of the employing class. Again, this goes a good way toward explaining the persistence of the high rates of injuries, diseases, and fatalities in 19th-century workplaces.

Fifth, while workers won some protections as the State intervened, one of the State's institutions remained unconvinced by the need or appropriateness of such interventions. The courts persisted in treating individuals who entered into contracts of work for wages as individuals who bore the risks of doing so. They continued to negate attempts by workers to get income replacement by suing their employers for injuries suffered at work. Government regulation told the parties how to conduct themselves, but this was not seen by the judges as laying down a corresponding obligation to make good losses suffered if the standards were violated. There was a need to force the courts to change their stance or to find another way to provide replacement income. Eventually (and eventually turned out to be a long time!), the latter solution was chosen. This, then, forced the intransigent courts to relent and to declare they were prepared to let workers sue employers for damages incurred at work.

In 1880, the English Parliament enacted the *Employers' Liability Act*, which allowed workers to sue for income replacement if they could point to another employee's neglect, overcoming the fellow employee doctrine which had been used to stymie them. It still left injured workers with the burden of identifying a culpable employee, quite a task. Workers continued to press for more accessible relief and were soon able to point to an 1884 Prussian innovation which became the platform used to enact the first British *Workmen's Compensation Act* in 1897. This Act did away with the need for injured workers to prove any more than that their injury had occurred in the workplace. It was a big step forward, but the number and kind of workers who could take advantage of it remained quite limited. It was only to be available to those workers whom we call blue collar workers today, the more obvious victims of the nasty conditions which persisted in most workplaces. New Zealand, which enacted its first *Workers Compensation Act* in 1900, similarly restricted the Act's scope to those workers who were deemed to face the worst conditions of all. This speaks to the hold the common law and the judiciary had on policy-makers' minds.

The judges remained antagonistic. In 1905, an English court noted that it felt that the reform of the common law by the enactment of a Workers' Compensation Act should be restricted to apply to those who were not really autonomous humans, who were deeply dependent on others, and who were not intelligent enough or too poor to make sovereign choices. And to foreshadow the argument to be made later in this chapter, note that this disparaging view of working class people was not, and still is not, confined to the insular and unworldly judiciary. The judiciary's influence as mindset creator (see chapter four) is not to be ignored. In 2009, Boris Johnson penned an article whose title was "Health and Safety Fears Are Making Britain a Safe Place for Extremely Stupid People." David Cameron, not to be outdone, told the public that legal protections for workers and consumers were "an albatross around the neck of British business" which he pledged to remove.

To return: the unceasing pressure to find relief for the many workers instantly impoverished if they lost their source of income was effective, and workers' compensation systems flourished and were enriched in terms of benefits granted and scope. Gradually, the judiciary realized that its position was untenable. It abandoned the argument that, simply by agreeing to work

for wages, workers gave up any expectation to have employers abide by an enforceable standard of care. By 1939, the House of Lords announced its willingness to imply a term into every contract of employment which imposed a duty of an employer to provide a safe system of work, which includes providing proper materials, employing competent workers, and providing valuable supervision. There was now a realistic chance that workers could succeed in getting damages from their employers to help them overcome their loss-of-income predicaments. This, in turn, made employers more willing to support the workers' compensation regimes.

Workers' compensation in an industry could be based on setting up a fund into which all those in the industry paid premiums. This scheme of cross-subsidization made costs predictable and controllable, a luxury a judicial system never bestows. The irony is that it was the employing class which now became a strong supporter of keeping the courts out of health and safety issues. It should be noted here that—given the prevailing libertarian ideology—the development of a socialized insurance scheme which would make such a regime work efficiently took a long time to become part of the social wage.

In sum: the provision for replacement income took a long time to evolve. In the meantime, huge numbers of workers and their dependants were thrown onto the scrap heap by the combination of a haphazard and episodic set of preventive interventions by governments and the stubborn adherence by the influential judiciary to the principle that work-for-wages contracts were voluntary in nature. As far as the common law went, workers were, or should have been, aware of the risks they took and, therefore, responsible for unhappy outcomes.

So, yes, the sketch of the very long period of gradual, occasional preventive measures to ameliorate anti-worker legal doctrines is reflective of a harsh approach to the health and safety of workers which was softened, bit by bit. The slowness of the progress made—which was heavily influenced by the need to keep investing capitalists somewhat content—might fairly be described as demonstrating an indifference to workers' welfare.

But, slow though it was, progress was made. We now do have more sophisticated and more encompassing replacement income regimes and much more extensive and generalized prevention schemes in place. Positive

changes have been wrought. But how profound is the nature of these changes?

## THE MAJOR IMPROVEMENTS

At their core, workers' compensation regimes remain as first envisaged. An injury/disease must be relatable to work and the workplace. Once that is established, replacement income will be due. The process often explicitly takes the costly and dilatory judicial system out of the loop altogether, a huge social saving. And the schemes have been expanded and enriched. They cover more workers and include more injuries and diseases than they used to. A further enrichment is access to medical treatment and rehabilitation services. These are significant advances. Much, however, remains contested.

Employers always want to lower their premiums (which, as will be noted below, they wrongly believe they are paying). This leads them to oppose the widening of the kinds of people covered (in some places, the injured person needs to be an employee, with all the difficulties of definition this brings, see chapters six and seven), the inclusion of certain diseases as compensable ones, the inclusion of benefits for injuries such as heart attacks at home, of stress-related problems, and the like. They may argue for lower rates of compensation awards for those injuries and (few) diseases that are covered. As part of the rehabilitation schemes, workers' compensation boards may require workers to return to work when those workers do not feel ready. Medical disputations are spawned. There are many technical and bureaucratic fights: about the administration of claims, the rehabilitation processes, whether or not the compensation scheme should give relief to employers with good records by lowering their premiums (giving them rebates) and punishing those with bad experiences, whether or not this may lead to the fudging of records by asking/persuading workers not to file claims and paying them while not working.

These flaws and difficulties are not universal; jurisdictions cope with the problems differently. Replacement income, even in these supposedly non-fault schemes, is not always available without fights generated by the reasoning which underpins much of a fault-based system, for example, finding a relationship between the employer and the injured person that fits the description, the need to prove some causal connection between work

and the claimed debilitation, the need for a finding about the extent of the injury/disease, and the like. These are, of course, the kinds of problems claimants would face if they were allowed to pursue their claims for workplace hurts in a common law court which, notionally, might happen, as the judiciary had been forced to change its position on the binding logic of *volenti non fit injuria*. That said, the workers' compensation schemes are, in practice, from a working class perspective, a whole lot better than the common law torts system, where workers have to have considerable wherewithal to pursue their claims.

Whatever remaining difficulties are posed by the shortcomings of workers' compensation in any jurisdiction, its ever-expanding coverage provides convincing evidence that the manifest indifference shown to workers by the 19th-century judiciary no longer rules the roost. What does stay constant, however, is the high number of claims. As the opening to this chapter documented, worker injury, disease, and fatality rates remain a public health catastrophe. This is so despite the fact that, on the statutory prevention side of the issue, there have been great leaps forward since those early Factory Acts and their ilk were introduced.

From the mid-20th century onwards, as part of the post–World War II reforms, and boosted by the rise of worker militance (see chapters three and four), policy-makers embarked on more systematic efforts to deal with injuries and deaths at work. Alfred Robens, a former trade unionist and chair of the National Coal Board who had become a life peer of the House of Lords, was appointed to head a commission. Great Britain's Robens Report, issued in 1972, caught the spirit of the times and laid down the approach which still governs the issues in the jurisdictions which are the focus of this book. Centralized occupational health and safety regulators were given the reins. They gathered all the previous statutory standard-setting instruments aimed at specific problems in specific industrial settings and embedded them in a regime of general duties of care for the parties, the details of which are worked out on an ongoing basis. These duties are owed in all sectors of productive enterprise.

The duties to take care are imposed on both employers and employees. They are to abide by standards set by the administrative agency created to oversee the operation and implementation of the statute. This demands a certain amount of disclosure by employers in respect of known safety and

health hazards and of the level of dangers particular employees may be asked to face. Workers have been given some statutory support for the right to refuse work under (rather narrowly) defined circumstances. Depending on the size of an enterprise, the statute may mandate an internal monitoring scheme to assess the level of compliance with these statutory duties. To this end, joint health and safety committees, on which the employer and employees are to have an equal number of representatives, are to be established. In smaller firms, a single worker representative may serve this function. These monitors are to be given access to the site and may make recommendations to improve safety conditions in the workplace. The standards in respect of which the duties concerned with the physical conditions and exposure levels at workplaces are imposed are to be set by experts and scientists external to the workplaces. More, a director or manager of the government agency charged with the administration of the statute is to keep an eye on the safety of any new substances or technologies introduced into workplaces. While details differ across the jurisdictions, the nature and purpose of this kind of regulatory regime are uniform.

On the face of it, the Robens model—as it is often called—is, from a worker's perspective, vastly superior to the haphazard protective schemes which evolved during the 19th century and remained in place for much of the 20th century. Today, no workers (or, at worst, very few workers) are left unprotected; there is a coordinating agency with standard-setting and enforcement with public obligations and powers to ensure the efficient working of the health and safety regime. It is very well equipped to carry out its explicitly given tasks: it has a large number of inspectors and scientific experts at its disposal. Workers have legally supported agency, something they did not have before the Robens model was implanted. They can participate directly in the implementation and operation of the governing legislation. These are considerable advances. It is easy to see why many would consider it inappropriate to think of modern capitalism's way of dealing with injuries, diseases, and deaths at work as reflecting an indifference to workers' well-being. Yet, while the scope of replacement income and the efficacy of preventive measures are much richer than they were, it is also true that the conceptual approach has not changed as much as these on-the-ground improvements suggest.

The starting point still is that all productive activity entails risk and that the creation of risk is, therefore, not inherently wrongful. It is assumed that employers and employees both want to produce wealth by working together and both have an interest in reducing the materialization of risk as much as possible. There is a consensus.

It is still true, therefore, as it was throughout the 19th and early 20th centuries, that the launching of a profit-seeking undertaking should be treated as innocent, indeed laudatory, conduct. The owners of the means of production remain the primary deliverers of welfare and, therefore, must be encouraged to invest their assets. The Robens model does not seem to think it useful to put any pressure on the owners of the means of production to use their capital in any particular way.

They remain free to eat and otherwise enjoy their considerable mountains of assets. They do not have to invest them if they do not want to do so. They owe us, the rest of society, no obligation to risk their property so that we might get some crumbs. They have no duty to provide for our overall welfare. They should only consider their own.

Liberal law types might say that all this is fair: after all, there is no legal obligation for non-property owners to enter into contracts for wages. But, of course, there is no need to worry about getting the propertyless to enter into contracts: their need to survive will coerce them into investing their bodies and minds.

**DUTY TO RESCUE**

The common law does not impose a duty to rescue on any of us unless we have a particular relation to the imperilled person, such as a parent or guardian to a child, a police officer, or a medical practitioner who is involved in treating a patient. This category of legally burdened rescuers does not include employers. The Robens model does not change this basic feature of capitalist relations of production.

In sum, the 18th to early 20th centuries' starting point, namely, that owners of the means of production owe the rest of society no duty to invest or to invest in any particular manner, is still in place. We continue to treat

any property owner who puts some of its wealth to work as a positive contributor, as a virtuous person acting benignly. The dominant political impulse is to encourage them to act virtuously, benignly. Our system offers property owners subsidies, cheap water, land, electricity, and low property rates to make it attractive for them to invest some of their monies. Governments like to trumpet that they are "open for business." This includes the promise that "entrepreneurs" as potential risk-takers will not be burdened with unnecessary "red tape" or other needless costs. The imposition of costly harm-preventing measures should not be undertaken without much deliberation. Governments begin with the premise that they should only impose risk-averting measures when these measures are known to be essential. Hence their reliance on the body count, on workers as canaries.

And, of course, because risks which materialize are seen as the undesired consequences of innocent, of welcome, investments by virtuous capitalists, it makes sense to ask the investors whether a standard will be too stringent, will be so costly that it would cause them not to invest. It is assumed that they have no interest in harming their workers, so they can be trusted. More, they are in the best position to detect the potential risks: they control where, how much, and for how long to invest, what products to make, what materials and equipment to use, what kinds of skill should be bought, that is, as they invest they develop a business plan. As virtuous, innocent people, wishing no one to come to harm, it makes sense for administrators—with their limited skills, resources, and knowledge (there are literally millions of different kinds of enterprises, substances, and equipment to govern)—to ask the owners of the means of production what kinds of risk-preventing measures are acceptable to them, what measures make good business sense to them. The terminology used to describe these practices is telltale. Most health and safety statutes say that the standards should demand no more than what is reasonably practicable to profit-seeking firms. In short, the owners of the means of production are asked to play a direct part in setting the standards by which they are to be bound.

An obvious difficulty comes into view: what maximizers of profit see as too great a cost to them, or how dangerous a particular way of production is likely to be to worker, will be shaped by the profit maximizers' self-interest. This led Adam Smith (in volume I of his *Wealth of Nations*) to caution law-

makers: “The proposal of any new law or regulation of commerce which comes from this order … comes from an order of men … who have generally an interest to deceive and even to oppress the public, and accordingly have, upon many occasions, both deceived and oppressed it.”

It is a corollary of our continued treatment of property owners as innocent, benign wealth- and risk-creating actors that the standards imposed to safeguard workers are always more likely to be too low to save workers from injuries, diseases, and deaths. And another consequence of this age-old approach is revealed. Consider the implications of this well-known story.

Two first-class professional boxers, Evander Holyfield and Mike Tyson, were to face off to fight for the heavyweight title of the world. Two fit men were to try to hit the other as many times as they could, as hard as they could. They were permitted to do so by the regulations which govern boxing. They were skilled and tough and were expected to injure and hurt each other. They did so. Then, suddenly, almost before the fight had really got under way, it was over. Tyson was disqualified and Holyfield declared the winner. Holyfield had not landed more or better punches. Tyson, however, had bitten off a bit of Holyfield’s ear. That violated the standards set by the regulators of boxing and Tyson lost his right to continue to hit Holyfield, as hard as he could, as often as he could. That right to inflict pain and harm was forfeited because he had inflicted pain and injured in an unapproved way. The lesson is clear: in boxing and other violent legalized confrontations (hockey, cage fighting, kick-boxing, football), a limited amount of harm to other people’s integrity is permitted. Thus, if boxers wear a certain kind of glove, hit with a closed fist, do not hit when a referee tells them to stop, only hit specified parts of their opponent’s body, and do not use other equipment, such as their knees, elbows, feet, or teeth, they may use such force as they can muster. They have a permit to do damage to that extent. They have been given an exemption to an otherwise universal legal rule that there can be no consent given to the infliction of physical harm. If they violate the terms of that permit, of those regulations, they will be punished.

This is what happens in occupational health and safety regulation of the Robens kind, just as it did in the 19th and early 20th centuries. The virtuous property investor is given a permit to inflict harm. As seen, their

participation in the scope and coverage of the permits means that the enforceable standards by which they are to abide will not be too onerous for them and, therefore, the danger to workers, now permitted, is correspondingly augmented. If an argument is raised that, unlike boxers, employers do not intentionally inflict harm on workers, three points need to be made. First, boxers are assumed to accept the risks of their opponents hurting them while staying within the rules; so are workers. Second, in one significant way, boxers (and their like) are much better protected than workers ever are. The rules of boxing minimize the risks associated with this permitted violent undertaking by matching fighters of roughly equal weight and size, and the rules are premised on the understanding that both contestants might inflict hurt. The assumption is that both boxers are exposed to the same risk. This relates to the third point. While it is true that, unlike the fighters in a boxing bout, employers do not identify a particular worker to be hurt, they know that someone will be hurt. And, while the persons who will be harmed are unknown, it is known that they will belong to a specific class.

The risks undertaken by employers and their workers could not be more different. The reason that the failure to provide a good level of safety in the workplace has always led, and continues to lead, to serious political struggles, and always threatens to undermine the legitimacy of capitalist modes of production, is that the well-known recitations of the vast numbers of injured, illness-stricken, and prematurely killed people describe the perils faced by only one class of people. Workers are the victims; no one else.

The ILO tells us that the continued exposure of people to asbestos, long after employers knew it imperilled lives, means that over the next 50 years or so, 107,000 people a year will die prematurely, that is, circa 5 million human beings will perish. Hardly any of them will be employers or their managers. This is true of all incidents, whether they lead to traumatic injuries or terrible maladies: nearly all of the physical burdens of unsafe, unhealthy workplace are borne by the working class. Of course, every time safety failures occur, it may well be that employers (but not necessarily shareholders who profited from saving on prevention measures) lose something. Their worker compensation premiums may go up; there will be costs associated with the lost time of the victim, as well as that of other employees and managers involved with the injury-causing incident;

administrative costs of recording details of the incident may be incurred; there may be costs of lost production during a necessitated downtime, of having to retrain the injured person upon return; there may be costs of having to recruit new people, and the like. In short, the losses suffered by the owner of the means of production are not, in any way, of the same nature or as grave as those harms suffered by debilitated workers and their dependants. Workers may also suffer some financial losses inasmuch as they are not made whole again by the workers' compensation system. But they lose much more than that—they bleed, suffer, and die. Employers may lose a few dollars.

Now the deception, the fraud of the assumption about risks associated with capitalist modes of production is on display. Holding out that the issue is not one of class difference and conflict, that risks are associated whenever people and things come together to interact, that both parties, therefore, agree to a level of harm, and that we should leave it to them to work out what that level should be to the extent that this is possible, allows capitalists to be characterized as virtuous, and injured and killed workers as regrettable collateral damage. Nothing evil here. Capitalism has nothing to do with it. This is the benefit bestowed on the ruling class by law's embedding of the notion that the creation of potential risks is generated neutrally, that legal interventions should therefore be limited.

The extent of the benefit bestowed on the employing class can be gauged by asking a "what if" question.

What if the production of goods and services was not undertaken to advance the private accumulation of socially produced wealth in a competitive setting? Would anything change? It would still be true that the bringing together of people, substances, equipment, and technologies would create risks for the producers. But, if the aim of those producers was not to maximize the profits of the few but, rather, to serve the needs of one and all, the producers would evaluate the risks they were willing to accept quite differently. One of the workers' essential needs is their continued physical well-being. This goal would get much more attention in a system in which it is not to be balanced against anyone else's need to maximize profits. A totally different calculus would be deployed.

The limits of the reforms inherent in the Robens model may now be seen more clearly. Plainly, the notion that risks arise neutrally in some way

regardless of the purposes of engaging in production is fraught. The acceptance of that fraught logic entails that it is acceptable to permit the infliction of a certain amount of harm. The fact that that harm is borne most heavily by one class of risk-takers is unfortunate, presumed not to be planned. The Robens model has embedded this scheme, first enunciated by those notoriously anti-working-class judges, even as Robens himself and his many contemporary supporters (undoubtedly genuinely) are intent on making workers' lives, better, safer.

One of the consequences of the built-in assumptions of the Robens model is that, as employers are not intent on hurting their workers and as there is a pressing need to have them "risk" their capital, disputes about health and safety in the workplace are not to be treated as adversarial ones. An adjudicating tribunal, as reported in the case of *United Steel Workers of America* v.*Cominco*, set out its understanding of its role in interpreting a Robens-style legislative regime: "Safety is not intended to be an adversarial issue. Life and limbs are not intended to be negotiable items." A 1976 Royal Commission on the Health and Safety of Workers in Mines, in Ontario, whose authors were well aware of the then recently issued Robens Report, argued that "questions of health and safety are not suitable issues for collective bargaining."

It is as clear as it can be: there is to be none of this class-conflict stuff when it comes to questions of health and safety; all, capitalists and workers, are interested in making work as safe as possible, even though it is only workers who will suffer the physical impacts. There is to be no bargaining about the issues as though there were antagonistic interests at play. This is so even though such standards as do exist and the extent to which they are monitored and enforced are, in part at least, a function of the political struggles over these issues between capital and collectivized labour. This history is to be forgotten, it seems.

Thus, when workers exercise their right to refuse work they believe to be dangerous, they must not be supported by other workers. Each claiming worker is to stand alone and run the risk of having made a mistake and suffer the consequences.

Rational debate between the parties and experts as to what is practically reasonable is the mantra of this system between parties who have a deep-seated conflictual relationship. The economic inequality which frames the

negotiations based on rationality is to be ignored. This puts workers at risk. The assessment of what is practically reasonable gives great sway to what the owners of the means of production say is the maximum intervention which will allow them to make a reasonable return on their investment. The proof is in the eating of the pudding. The legislative schemes are shaped and moulded by this solicitous approach to capitalists' needs.

### ITEM: JOINT HEALTH AND SAFETY COMMITTEES

When they are present (mostly where there is a union and hardly ever where there is not), joint health and safety committees do give workers access to information and allow them to make recommendations to the employer. These committees are constituted by an equal number of employer and employee representatives. If a recommendation does not have majority support on the committee, the employer is free to reject it. Manifestly, the right of a property owner to do with its property as it likes until the law intervenes directly is being reaffirmed. The so-called balancing in a non-adversarial setting remains heavily tilted to favour the employing class, even when the workers involved are legally and functionally better off than most others are. Coercion as a result of economic imbalances remains a valid default position under the Robens model.

### ITEM: MONITORING AND ENFORCING

As the owners of the means of production are seen as voluntarily benefiting society when they invest some of their property, it is extremely hard for a health and safety agency to have its inspectorate behave like police officers when they uncover non-compliance with such standards as do exist. The agency and its inspectors have internalized the notion that the State's focus is to promote and facilitate investment by profit-seekers. They share the belief that those who invest are virtuous actors. Their natural inclination and dominant practice is to advise employers as to how they should and could comply when there is a finding that a workplace does not comply with the established standards. They see themselves as an educational force, helping a co-operating class of actors. Only when all else has failed are inspectors likely to reach for their enforcement tools and lay charges in respect of a violation of a standard they have uncovered and which an

employer has failed to rectify after having been asked to do so. This draws attention to a central feature of the Robens model as it is operated today.

It will be remembered that, during the Factory Acts period, legislation was enacted which set standards which, if breached, were intended to lead to criminal punishment. Stigma is, of course, meant to accompany a finding that a person has committed a crime. The 19th-century inspectors' notion was that this class of perpetrators (owners of wealth) could not be, should not be, stigmatized. It was neither efficient nor proper. This approach has been further refined and embedded in the modern occupational health and safety regimes. The inspectors are seen as the fallback enforcers of standards. It should be left to the parties to see that the established standards of safety are maintained. The scheme's inspectors are to support this self-management (referred to in Canada as the Internal Responsibility System, IRS). Their capacity to assist the workplace parties as they implement the IRS is enhanced by having the residual right to prosecute intransigent violators of safety standards, that is, they can activate what Canadians call the External Responsibility System (ERS). Here an important point needs to be made.

When today's inspectors lay charges, they are enforcing a regulatory law, an administrative law aimed at keeping a smooth-working daily order in place. This contrasts with a criminal law which sets out to root out dangerous-to-the-public, morally reprehensible conduct. The 19th-century inspectors had to twist and turn (which is how that institutionalized ambiguity evolved) to get to the position with which the Robens model regimes explicitly begin. The contemporary health and safety schemes are posited on one central notion: there is nothing inherently dangerous to the public, there is nothing inherently morally reprehensible about the creation of risks in the workplace. When things go awry—as they surely will from time to time—criminal law furnishes the wrong remedy, sends the wrong message. What will have happened, regrettable though it is, is part and parcel of virtuous, highly desirable activities which must be encouraged, not stigmatized.

This assumption is so deeply embedded, both ideologically and in practice, that the Robens model makes it much easier to prosecute breaches of the duties imposed by an occupational health and safety statute than it is for prosecutors to proceed against alleged violators of criminal law proper.

In the latter case, the prosecution has the heavy burden of proving all the elements of the crime beyond all reasonable doubt. Being convicted of a true crime carries serious penalties and is intended to publicly humiliate and shame the offender. Social disapproval is a front-and-centre objective, and respect for the autonomy of all individuals means that, ere a conviction be registered, the State must ensure that there can be no doubt about its good faith and devotion to procedural rules, that the accused persons intended to act as they did, and that the weight of the evidence justifies a conviction. All of this is strongly diluted when a mere regulation is being enforced. When the inspectors feel they should activate the ERS and lay charges, they have a very light burden of proof. They merely have to show that the conduct by a workplace party violated a standard. The intention of the violator is not legally meaningful. Nor is the harm such a violation caused; indeed, a charge may be laid even if there was no harm. The corollary is that when there is serious harm, this fact is not legally germane to any regulatory charges that are being laid. As a consequence, any conviction under a modern occupational health and safety act is robbed of much of its gravitas. It will fail to satisfy the visceral need to make a public statement about bad behaviour leading to serious harm.

The Great Lakes Power case which opened this chapter serves to illustrate some of these points. The violations of some elementary precautionary safety rules were easily established. The charges succeeded. But they said nothing about the seriousness of the harm or the profit-chasing employers' utter disinterest in their workers' well-being. The penalties imposed acknowledged the findings that basic standards had been breached, but said little to nothing about the terrible pain and suffering inflicted and nothing much about the shocking indifference to human life. Although the court, when sentencing a lowly managerial person (the only sentient person held to account!), made much of the fact that the employing corporations' lack of any sense of responsibility for the welfare of others was part of their business model. Ordinary people, people not steeped in Robens model thinking, might well think this kind of business model deserves to be criminalized. After all, those are the rules by which they, as ordinary citizens, are asked to play.

Take the case of a man who drinks too much before he gets into his car to drive. He is singing as his car weaves across the road and kills a pedestrian he never saw. He will be charged and found guilty of having breached all sorts of highway driving regulations. He may also be charged with a homicide. The public would expect no less. This drinking driver's moral failure is considered far too important to be treated as a mere departure from some reasonable rules. Like Great Lakes Power, or any other such employer, the driver had no intention to hurt any particular person. Yet he is judged much more harshly than Great Lakes Power, whose blameworthiness was measured by its failure to abide by some administrative safety rules, not by criminal law standards which are designed to punish those whose conduct is repugnant to society. The disparity in treatment is stark: After all, what had the drinking driver done? He had made a decision not to think or to worry about the effect his pre-driving behaviour might, was likely to, have on other people. Manifestly, indeed as found by the decision-making court, Great Lakes Power's and Neat Site Vegetation Experts' routine pre-injury practices were heedless of how they might affect their workers. Worse: whereas the driver behaved as badly as he did because he was self-indulgent and/or simply thoughtless, the employers' disregard for the rules (including their own rules) were an integral part of an agenda which chose to privilege making profits at the expense of people's lives. They had spent thought on how to operate to reap monetary benefits. From a social point of view, if this is not criminal behaviour, what is? How can the harsh treatment of harm-causing, thoughtless drivers and relatively tender treatment of harm-causing, rational employers be explained?

One explanation is that car drivers are not engaged in capitalist activities when they do their thing. They are not involved in the private accumulation of socially produced wealth in a competitive setting. Law, even as it pretends to treat all sovereign individuals even-handedly, creates niches which privilege capitalist practices. This is never said explicitly. Law and its functionaries purport to act neutrally as they create several existing legal options to deal with recurring difficulties and disputes. Claiming that it is sensible to promote and to facilitate the agenda of private accumulation in a competitive setting, they sideline criminal law as a tool of policy to ensure better behaviour. The justifying argument is that the good intent of

the owners of the means of production and the need to take some risks if overall wealth is to be generated make criminal law inapposite, indeed counterproductive. What is understood but left unsaid is that, if conduct based on making profits at the expense of workers' lives were treated as criminal in nature, it would lead to the stigmatization of capitalism's basic agenda. The system's legitimacy would come under pressure. This unarticulated pressure was felt by the Factory Acts inspectors, who instinctively instituted practices to marginalize the use of criminal law. The Robens model regimes get to the same result by design. Indeed, under their aegis, even the direct enforcement of non-criminal rules (the ERS) is seen as extraordinary.

The presence of the class issue and the need to mask it is what prompts policy-makers and the legal system to pretend that they are acting on a scientific, incontrovertible assumption when they argue that it does not matter what system of relations of production prevails in society. Risks are equally associated with any system that brings people, machinery, things, and substances together. This approach to risk creation makes it seem logical and natural to say that *who* the participants in production are, *what* their relationship is, and what the *goals* of the production are, are not central questions when deciding how to regulate production. Class and class relations are not central. This creation of the illusion that class does not matter is furthered by the existence of the widely accepted workers' compensation schemes. Their very existence suggests that a capitalist system does care about workers' health. Not emphasized is that these schemes socialize some of the costs for employers as they continue to inflict hurts and harms on the working class. Resort to manifestly applicable criminal law provisions, with the attendant stigma they bring to impugned actors, would spoil the impressions of a consensus rather than a class-conflicted system. Defenders of the status quo sought to avert the danger of having people becoming aware of the lack of any real consensus.

Sometimes facts on the ground make the task of status quo defenders quite difficult. There are many exposés which remind the general public that some injuries, diseases, and premature deaths suffered by people who simply went to work should never have happened. Sometimes attention is drawn to harms which began to occur years ago and continued unabated, untroubled by law or by supposedly concerned owners of the means of

production. An obvious example is the mining and processing of asbestos. Employers knew for decades that their workers' exposures led to lung diseases and early deaths. They hid this information from all who might take action. They destroyed and falsified documents; when they did settle with workers, they exacted non-disclosure agreements so that other suffering workers would not be alerted. The story is well known because this chicanery was revealed during litigation. The numbers affected, the horrible debilitation suffered by the workers before they succumbed to their maladies, all of this is known now. The wilful, knowing disregard for the lives of workers screamed out for the treatment of the perpetrators as social lepers, as criminals. They have not been so treated. They were ordinary capitalists doing ordinary capitalist things. So also when plastic manufacturers exposed workers to vinyl chloride which led to liver cancers rarely found in populations not so exposed, or lead poisonings which led to serious neurological disorders. Or, just recently, the discovery that the pulverization of engineered silica stone to provide well-heeled people with shiny countertops and glistening kitchen islands has led to a new explosion in Australia of silicosis, a disease associated mostly with mining and which had been virtually eliminated. The disease is incurable.

In addition to this very long list of well-known, unhindered, long-developing onslaughts (and many more examples could be added), there are the explosions, collapses, and collisions which injure, maim, and kill many in one fell swoop. There was Bhopal and its 10,000s of victims, workers and neighbourhoods, the Rana Plaza collapse and inferno, the Esso Petroleum explosion in Bass Strait, the BP disaster in the Gulf of Mexico, BHP and the mining tragedy when a dam collapsed in Minas Gerais, Brazil, Hooker Ltd. and Love Canal, New Zealand's Pike River Mine collapse, Nova Scotia's Westray Mine explosion, England's sinking of the Herald of Free Enterprise, the Southall, Landbroke Grove, Hatfield, and Potters Bar transport disasters …

There is a steady diet of collapses, explosions, and collisions, killing wholesale. Bystanders are hurt, but, for the most part, workers are the victims. Each time such a dramatic event occurs, the public is shocked and reminded that the risks which, supposedly, naturally inhere in all productive activities are much greater for workers than sober, purportedly science-following policy-makers had led them to believe. Why was anyone allowed

to engage in this activity, given its known risks? Why were people with poor reputations in respect of safety or people with little experience allowed to run these risky activities? Why did governments not have better regulations? Why was there not better monitoring and enforcement of regulations? Should anyone go to jail? Each time, the policy-makers, the politicians, and the employers express shock that anything so horrendous could have happened. Their language is revealing—they talk about accidents and spills, that is, unforeseen events that no one wanted to materialize. Of course, when people remember the asbestos kind of story, this is not always an easy "sell": there seemed to be a long-running business model which, in part, relied on not spending any money on keeping workers safe and on keeping them ignorant of the risks that the employers knew of.

The elites are forced to go into overdrive. There is a felt need to rebuild trust in the regulators and, thereby, in capitalist relations of production. Reassurances are given that regulators will take on board the lessons learned. New standards, more efficacious monitoring, will be designed. A recent response is for politicians to say that, in some cases, some aberrant employers will be treated as criminals. New criminal provisions are enacted to prove the sincerity of the policy-makers' approach. They are saying: See, even the owners of the means of production are not, contrary to what you might have thought, above the law.

They do not mean it, of course. As this chapter has shown, law and its practitioners have always gone out of their way to ensure that existing criminal law provisions which could be applied to many of the situations of maiming and killing listed above will not be so used. In a piece Susan Rowland and I wrote, we demonstrated that there were at least eight serious crimes created by the Criminal Code of Canada which could easily be used against employers who hurt workers. These provisions, which regularly are applied to the public at large, have not been invoked by those responsible for workplace health and safety. Rather than apply these existing provisions, law-makers have chosen to enact new provisions to deal with what is often termed "industrial manslaughter." This allows them to say that their past failures to criminalize heedless profit-chasing were attributable to technical difficulties (specifically the presence of intermediaries such as corporations and the difficulty of attributing intent), not to their desire to exempt the employing class from laws which bind everyone else. They

have now remedied the technical problems. Given law's history of reluctance to use the criminal law, are we to believe that a leaf has been turned? The proof should be in the eating of the pudding.

First, it is to be noted how exceptional policy-makers believe criminalization is. They do not think it useful or appropriate. This is evidenced by how hard it was for legislatures, even as they worried about the erosion of trust in the Robens model, to enact novel criminal law provisions. For example, in the UK, the *Corporate Manslaughter and Corporate Homicide Act 2007* became effective in 2008 after thirteen years of debate and struggle; in Victoria, Australia, the *Workplace Safety Legislation (Workplace Manslaughter) Act 2019* came into effect in 2020 although it had been introduced in 2002; in Canada, the provisions popularly known as Bill C-45 or the Westray Bill came eleven years after they had been recommended by a high-powered commission of inquiry into a terrible disaster which had made a finding that the kind of employer conduct revealed should be criminalized. Not only did it take this long, none of the apparent culprits in the Westray Mine disaster were ever convicted of any crime.

Second, and relatedly, when finally passed, the new criminal law provisions explicitly took a large number of potential wrongdoers off the hook. For instance, Australia's federal *Criminal Code Act 1998* seemed very expansive because it stipulated that there would be criminal responsibility for harm-causing conduct where it was done by, or for, a corporation that had an unacceptable culture. On its face, the Act would address the kind of problem thrown up by the Great Lakes Power case. But, because of constitutional difficulties, the Australian tough-sounding language does not cover health and safety issues. In the UK the new criminalizing does not allow senior managers to be prosecuted for the conduct which might be deemed criminal under the new legislation. These newfangled criminalizing provisions are enacted by legislatures which want to persuade the general public that they are serious about protecting workers from egregious employer behaviour. But, when the provisions are actually examined, they reveal that the legislatures are more concerned with how things look than they are about curbing employer excesses.

Unsurprisingly, the newfangled legislation has not yielded much by the way of convictions. This means that it has yielded little that is positive in

terms of specific and general deterrence, or by way of satisfying the strongly felt need by workers and their families and friends to see those wilful employers who injure or kill workers punished and stigmatized. Prosecutions and convictions are rare events. A study by Steve Tombs showed that, after five years of operation, the new UK criminal law had led to just three convictions “all in fact against small companies that could have been successfully prosecuted under the old offence of manslaughter.” In Canada, Norm Keith, a lawyer who serves the corporate sectors, reassured his clients that, after ten years of operation, the much-delayed Westray Bill presented them with little danger: “There is a statistical risk of 0.1 per cent that a Bill C-45 prosecution will be initiated when there is a workplace fatality. If the same statistic was applied to homicide, assault, robbery and commercial fraud, there would undoubtedly be a public outcry.”

Workers are, as far as the law is concerned, not worthy of too much protection, as it might frighten off the class that really matters, the owners of the means of production.

## SUMMATION

1. It is assumed that both parties, the owners of the means of production and workers, are equally free to enter into contractual relations. Both need to calculate their risks ere they do so. This assumption is embedded in a legal system that sees all individuals as equally sovereign and equally entitled to use their assets as they choose. Both parties are free to choose: employers whether they want to risk their inorganic property, workers whether they want to sell their very human attributes.
2. The owning class, precisely because it is the owning class, is free to decide not to invest its property unless it can make a profit. Workers are forced to sell their labour power. Would-be employers do not have to take a risk they do not like; workers do.
3. The owning class can, and does, calculate the risks it is willing to take. It decides how much of its capital to invest, where and for how long, what to produce, what equipment, materials, and substances to use, what skills will be needed, and the like. These decisions enable them to identify the risks of their operations. Those risks are built in when workers come to work. If the workers are fortunate, there will be some enforceable safety

standards in place. Other than that, they have to fight to avert any dangers to which they find themselves exposed. The starting assumptions put them in a reactionary position.

4. When it comes to the kind and level of risk creation, employers have the greatest amount of control, followed by governments, which decide to set some minimum enforceable standards, followed by workers, who participate most directly by being hurt. When it comes to suffering, that is, when workers are made ill or are injured or killed as a result of their working conditions (or as a result of what the employing class and its cheerleaders like to call unforeseen and unforeseeable accidents and spills, making the whole thing sound like an act of some malevolent deity), the opposite is true. Workers suffer the most, physically and emotionally; governments pick up much of the financial cost, providing administrative supports, retraining facilities, the medical health system, and social welfare costs; and employers incur the least of the costs associated with the debilitation of workers. Neither physical nor emotional pain is felt by them. They may lose a bit of money. The logic should be that those who are most at risk, clearly workers, should have most of the decision-making power. After all this is the capitalists' logic when they argue that, as they are risking their capital, they should be the ones making the decisions about how it should be deployed. The modern reforms established to protect workers honour that idea as much as possible when it come to employers and as little as possible when it comes to workers. Everything is upside down in capitalism.
5. None of this has been changed in any fundamental way by the very refined occupational health and safety legislative schemes that govern this sphere. This is so because the starting assumptions—that risks inevitably arise whenever we bring people and materials together, and that these risks must be tolerated because they are part and parcel of generating wealth and abundance for all—have not changed since capitalism evolved.
6. When enough workplace injuries, diseases, and fatalities have become registered with a workers' compensation regime, new or improved standards may be established. While these curbs on employers' ability to do as they choose with their property are seen as necessary, they are always predicated on the idea that they must not become a fetter on

investment for profit. As potential investors are known to calculate risks (implicitly acknowledging that they do, or could, know the risks to which they will be exposing workers), they are asked to participate in the setting of standards. A lot of faith has to be put into the concept that both employers and workers have the same interest in the health and safety of workers in order to maintain the practice of allowing profit-seeking capitalists a direct participatory role in how much damage they should be allowed to inflict on workers. For that is what they get: a permit to inflict harms if they stay within certain boundaries. Workers' major role in the setting of standards is getting hurt in significant numbers. Other than that, they may make representations and recommendations. That is all. After all, real decision-making powers would allow them to force employers to do things with their property, something not envisaged by the system and not favoured by the legal regime which gives it its legitimacy. This is why both the employing class and law and its functionaries drive home the message that health and safety concerns should not be dealt with as if they gave rise to disputes between adversaries, as if they were issues arising out of class conflict.

7. To sell these logically fraught ideas, the legal system has provided—after quite a struggle—a replacement income scheme which sets out to make good the monetary losses suffered by injured and ill workers. Employers have socialized the costs by paying premiums into a fund. They often complain that the premiums are too high, or that the schemes cover injuries and diseases they should not, or that the benefits are too high or that workers scam the scheme by claiming to be disabled when they no longer are, all of which give rise to much disputation. What employers rarely acknowledge is that, while it does not look like that to any one employer, most of the premiums paid come out of workers' wages. Economists and the judiciary agree that, if workers had to buy their own insurance to secure income for themselves and their dependants in case of injury or sickness, they would have to ask for more wages. Overall, in an economic sense, the replacement income schemes are paid for by foregone wages. This underscores the point made that, when it comes to bearing the costs of workplace injuries and illnesses, employers bear the least of the cost in monetary and in physical and emotional terms. Everything is upside down in capitalism.

This chapter, like the others in this work, tells the story of how the structures and ideology supported by law to maintain and perpetuate capitalism ensure the dominance of one class over the other. In this case, the subjugation of one class takes a dramatic form: disabilities and deaths are the inevitable consequences of accepting the ideas and ideals peddled by liberal law. This threatens to delegitimate both capitalist relations of production and law's standing as a relative autonomous institution. Over time, a special category of laws, regulatory laws—as exemplified by the Robens model—has been established which permits both capitalism and law to further their message. This is that the status quo does bring inevitable risks, but those risks will be fairly managed. There is no need to think about developing a different system of social relations. All is as it should be, even if, to keep it all going, some people are injured, become ill, and die prematurely.

This sentiment is not shared by one and all. There are some, perhaps many, who find subjugation, maiming, and killing unacceptable. The absurdity and ugliness of a system which allows some to profit while others are required to toil and bleed was captured on a placard held by a striker on a picket line in Normandy in 2010:

*Je travaille*
*Tu travailles*
*Il travaille*
*Nous travaillons*
*Vous travaillez*
*Ils profitent*

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CHAPTER 12

# *The dignity of work versus the degradation of work under capitalism*

## THE CONVENTIONAL MANTRA: "WORK IS GOOD FOR YOU, NO MATTER WHY YOU WORK"

The union in Joseph Langston's workplace insisted that all workers must join the union. When Langston refused, his fellow workers told Chrysler, the employer, that they would not work if Langston did. Chrysler then sent Langston home on full pay. Not bad: an extra amount of paid vacation! Curiously, this did not make Langston happy. He told a court that he wanted to work and that this was his right. Putting him on uncontracted-for paid leave was a legal wrong. The Court of Appeal of England agreed. Lord Denning justified the decision by stressing the immense value of work:

> A skilled man takes pride in his work. He does not do it merely to earn money. He does it so as to make a contribution to the well-being of all. He does it so as to keep himself busy, and not idle…. To have the satisfaction of a task well done. Such as Longfellow attributed to the village blacksmith—
>
> > *"Something attempted, something done,*
> > *Has earned a night's repose."* …
>
> A parallel can be drawn in regard to women's work. Many a married woman seeks work. She does when the children grow up and leave the home. She does it, not solely to earn money, helpful as it is: but to fill her time with useful occupation, rather than sit idly at home

> waiting for her husband to return. The devil tempts those who have nothing to do.[7]

Chief Justice Dickson of the Supreme Court of Canada expressed similar, less misogynistic, sentiments:

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.[8]

And again, per Lord Hoffmann of the House of Lords:

> It has been recognized that a person's employment is usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity and self-esteem. The law has changed to recognise this social reality. Most of the changes have been made by Parliament … and the common law has adapted itself to the new attitudes, proceeding sometimes by analogy with statutory rights.[9]

The courts were echoing the principles proclaimed by the prestigious International Labour Organization. The *ILO Declaration of Philadelphia*, 1944, had stated: "All human beings … have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity." The Declaration then went on to specify what would have to be done to attain these lofty material and psychic goals.

And the motto and school song of my high school was "Honour the Work"!

The story sold by these sweeping statements (made by people with high status and who, undoubtedly, enjoyed great job satisfaction) is crystal clear. It is true that people work because they want to make a living. They should be happy about this because work will permit them to hone their skills and allow them to be proud of their product, fortify their self-respect, permit

them to satisfy their innate desire to contribute to the welfare of others, and, a real bonus, counter the temptation to be wastrels, to flit away time on frivolous and self-serving pastimes. The story sold is: Work is a social good, if ever there was one.

## GROUNDS FOR SKEPTICISM?

Yet, at the same time that so many important opinion-moulding institutions and persons laud the virtues of work, people are exposed to a barrage of signals which tell them about the wonders of not working. Our governments advertise, and profit from, the allure of gambling. Buy a lottery ticket and, who knows, money may be showered on you. Yachts, paradise islands, servants—it all could be yours. Most importantly, you would not have had to work for it and you will never have to work again. That is the enticement. It is very appealing to many people, especially poorly paid working people. Seemingly they do not appreciate the wonderful gifts that work is bringing to them. The pronouncements from on high do not correspond to their lives. In fact, they are suspicious of the earnest assurances that work is an unalloyed good. As the character Michael (played by Jonathan Silverman) in the 1992 film *For Richer, for Poorer* said: “If work is so ennobling, why is it the last thing the nobility ever does?”

The key to the contrast between the bromides on the nature of work and the way work is seen by workers is the context in which their work is to be done. The ideal of work is quite different from the reality of work done to maintain and perpetuate capitalism.

## SOME REALITIES ABOUT WORK

To reap the benefits of work promised by capitalism, its ideological gatekeepers acknowledge that, first, people must be engaged in work to earn an income. There is an implicit recognition that satisfaction of spiritual human needs is contingent on whether it has been in a capitalist’s interest to establish an employment relationship. The logic of capitalism, then, dictates that helping humans attain their potential is a collateral benefit of the acceptance of capitalism’s agenda, namely the private accumulation of socially produced wealth. This requires the extraction of surplus value from workers, which, on its face, leads to tensions between promised humane outcomes and actual outcomes. The resolution of these tensions does not

work out all that well for workers. When there is clash between the goal of profit maximization and the enrichment of people's quality of life, the second goal will be made to yield to the first. Money over people. Let me elaborate.

### *A right to a job?*

Despite Joseph Langston's legal victory which endorsed his right to work, there is no such thing as a right to a job. Langston's win merely signified that his existing job rights had been violated. To get benefits such as job satisfaction, self-respect, and dignity, people must first find a job, must find a capitalist to serve.

As has now been noted many times, a central feature of a capitalist political economy is that a few own the means of production and the many have no assets of their own except their talents and capacities. Unless they can find a way to survive, they must find an owner of assets who wants work done and is willing to pay wages to the workers with the talents and capacities needed. This puts workers into competition with other would-be workers. And the number of competitors is increasing every day. The ILO reported that, between 2000 and 2019, those who earned an income by working for others increased by 25 percent; the number of competing workers rose from 2.6 billion to 3.3 billion. While the word "worker" encompasses some salaried professionals, managers, and small business owners, an analysis by writer and activist Kim Moody finds that at least two-thirds of those counted, that is, 2 billion of them, should be considered to be employees as we normally understand that word (while many of the others might well be dependent contractors as I used that expression in chapter seven). This makes for ever-increasing competition as men object to women, children, and the elderly battling them for needed jobs; racial differences are exploited and emphasized to win competitive battles; xenophobia is heightened as people desperately try to hang on to what they have, even if this means denying the means to survive to others, whether they are nearby or far away. All in all, it is not a scene which does much to engender altruism, mutual support, or respect for others or oneself.

### *A choice to work?*

Most obviously this is not a scene which supports those fulsome declarations that the mere fact that people work will make them better, more fully developed, human beings. For that to be a plausible claim, the people doing the work should, at the very least, have chosen to do it freely. It is true, of course, that some individuals have rare talents (typically an athlete, an actor, or a performer in great demand) and are able to exercise real choices. For most people this is simply not the case. While, conceptually, all have some autonomy, some agency, in that they can decide to search for a job or not to do so, or accept or refuse a job offered to them, in practice these choices are very constrained. If they have no income, they will not survive. As a famed American Realist scholar, Robert Hale, argued, for those without money to buy food, or materials with which to make things or deliver services which will yield enough money to buy food, the law's insistence that owners of property are not required to share their property if they are not so inclined puts those without property in a very tough spot. He wrote: "It is the law of property which coerces people into working for factory owners."

Law is firmly committed to the maintenance of this system of on-the-ground coercive conditions. Even as, in response to the demands of disadvantaged non-property owners, legal instruments are created to regulate this private-property-based society, law goes out of its way to maintain economic circumstances that will push non-property owners to compete for jobs. Typically, such social security protections as do exist to help people in need will be denied to potentially productive persons if they refuse available employment. It has been this way since the Poor Laws came into being. While those without assets other than their talents are not, *in strictly technical legal terms*, forced to look for work, their circumstances do not normally give them much choice. Only the fortunate will enter into contracts to do work for remuneration on a truly voluntary basis. There is an element of compulsion, of coercion, which accompanies most employment arrangements.

Those people who find a job in this fiercely competitive world are not in a very good position to get a good deal from those for whom they are to work. As a famous labour law judge, Higgins, J., wrote:

> The power of the employer to withhold bread is a much more effective weapon than the power of the employee to refuse labour. *Freedom of contract under such circumstances is surely misnamed; it should rather be called despotism in contract* … the worker is in the same position as Esau, when he surrendered his birthright for a square meal, or as a traveller, when he had to give up his money to a highway man for the privilege of life. (emphasis added)[10]

The significance of this understanding for the argument that work is a platform that can be used by people to attain their potential is manifest. Many workers occupy mendicant positions when they vie for work for wages and accept degrading and harmful conditions. Outcomes often are the very negation of respect and dignity for workers. Consider:

**Item:** As already documented in chapter eleven, the ILO estimates that, worldwide, there are 260 million occupational work accidents and 160 million work-related diseases every single year. There are 2.3 million fatalities, that is, 6,000 every single day. No war matches these numbers. Would there be anything like these outcomes if workers had real choices about what kind of work they would accept?

**Item:** It is common to speak disparagingly of labour education camps operated by authoritarian governments. Yet eerily similar practices are not unknown in self-proclaimed liberal polities. The potential for work to contribute to people's well-being and self-respect is used as a justification for forcing truly marginalized people to work. The claim is that this conscription into working for others will help them become better-adjusted people. For a grim example, note that some non-profit, government-approved drug rehabilitation facilities in the US make their patients go to do work for private firms which do contract work for outfits like Exxon, Shell, and Walmart. These patients, being characterized as patients rather than workers, are not paid and are often uncompensated for any injuries they may suffer. During those outsourced working times, the rehabilitation centres are not treating them directly, yet, frequently, all of the fees the

patients pay are retained by those centres, who characterize their sending out of this free labour to profit-seeking firms as “treatment.”

A more common way to get cheap labour (justified on the basis that the cheap workers will benefit) is to force prisoners to work. *Democracy Now* reported on September 12, 2018, that, during California’s forest fires that year, 2,500 prisoners, including 200 women, were part of the 13,000-strong firefighters’ crews sent out. On average, professional firefighters earned $74,000 a year plus benefits; the prisoners were being paid $1 to $2.50 a day for dowsing the burning trees. While it may be good for the prisoners, it is also true that being allowed to force prisoners to work for next to nothing is highly profitable for some. In *Breathing Fire*, a 2021 book documenting the role of female inmate firefighters in fighting California wildfires, Jaime Lowe records that, over 13 years, California saved $1.2 billion. In July 2022, Murjani Rawls reported that the governor of California rejected a bill which would have entitled prisoners to a minimum wage of $15 per hour as well as other protections, and Charles Pierce noted that the director of Arizona’s Department of Corrections defended his decision to keep private and public prisons open on the basis that, without prisoners’ work, Arizona would not be able to keep its public services going. Chris Hedges has listed some of the beneficiaries of forced prisoners’ work in the US: Abbott Laboratories, AT&T, AutoZone, Bank of America, Bayer, Berkshire Hathaway, Cargill, Caterpillar, Chevron, Chrysler Group, Costco Wholesale, John Deere, Eddie Bauer, Eli Lilly, ExxonMobil, Fruit of the Loom, Geico, GlaxoSmithKline, Hoffman-La Roche, International Paper, JanSport, Johnson & Johnson, Kmart, Koch Industries, Mary Kay, McDonald’s, Merck, Microsoft, Motorola, Nintendo, Pfizer, Procter & Gamble, Quaker Oats, Sara Lee, Sears, Shell, Sprint, Starbucks, State Farm Insurance, United Airlines, UPS, Verizon, Victoria’s Secret, Walmart, Wendy’s. This list of major and successful businesses makes it clear there is no such thing as wages which are too low for profit maximizers, even if they require the forced labour and crass exploitation of the most marginalized people in society.

The notion that work forced on people in these ways will allow them to build their self-respect, make them feel useful to society, and give them dignity seems a little fanciful.

**Item:** All nation-states have abolished slavery (although only half have criminalized it), by which they mean that the right of people owning, treating, and trading human beings as if they were chattels is now history. But there are enough reports about abuses which arise out of conditions which approximate slave-type relationships to have prodded the United Kingdom to enact the *Modern Slavery Act, 2015*, California its *Transparency in Supply Chains Act, 2010*, France its *Corporate Duty of Vigilance Law*, Australia its *Modern Slavery Act*. While the term "slavery" is being used rather loosely in these statutes, the spirit which motivates these responses is clear. Law-makers have been made aware that there is enough dehumanizing of workers going on to justify enacting statutes with such dramatic titles. As an illustration of such exposés, note that some researchers who sought to get an indication of how much of the fish we eat has been harvested and processed by horribly oppressed labour adapted a widely used Global Slavery Index (GSI) for their study. Clearly, the very existence of this index is evidence of the widespread use of badly abused labour. The researchers characterized fishery practices as akin to slavery in that they fitted within the GSI definition: "situations of exploitation that a person cannot refuse or leave because of threats, violence, coercion, deception, and/or abuse of power." Other studies have found that such slave-like practices prevail in many sectors. In a 2019 summary of reports published by the ILO and the Walk Free Society, Kate Hodal documented that 24.9 million people are trapped in forced labour situations. They clean houses and flats; produce clothing; pick fruit and vegetables; trawl for shrimps; dig for minerals used in smartphones, cosmetic makeup products, and electric cars; they work on infrastructure (a recent eye-catching example being work done on the buildings to be used in the 2022 World Cup in Qatar). The researchers noted that these numbers, staggering as they are, are likely an underestimation, as many locales where such exploitation might occur did not have accessible data.

Leaving aside the issue whether it is appropriate to use the legal concept of slavery when assessing these kinds of work-for-wages sectors, the work done under these dehumanizing and parlous conditions is, to say the least, hardly conducive to the enhancement of dignity. To the contrary: it furnishes evidence that work under capitalism allows profits to be maximized at the cost of robbing human beings of their self-respect and, all

too often, their lives. The conditions of these most hapless of workers has a drag-down effect on the conditions of all workers.

**Item:** Many other workers suffer terrible terms and conditions of work, even if they may not always fit in with the elastic description of slavery. There are as many as 5,000 special labour zones sprinkled around the world, going by harmless-sounding names such as Maquiladoras, Special Economic Zones, Export Processing Zones, and the like. As many as 43 million people work in such places, places chosen by profit-seekers because none of the cost-imposing regulations found in advanced capitalist nation-states (there to protect the environment and workers) will spoil their drive for more profits. The outcome for workers is dire. And, again, these employer strategies intensify competition and lower workers' bargaining strength everywhere else.

Sometimes, the employers do not have to go elsewhere to get the same kind of advantage. Governments have always been able to increase or decrease competition for jobs by changing their immigration policies. The numbers of immigrants and requirements, such as special skills or language facilities, are used to regulate the flow and the impacts on local labour markets. Immigrants are encouraged to come by holding out the promise that they may be granted citizenship. They add to the pool of workers in competition and often (handicapped by language and debt incurred to emigrate) are prone to accept worse conditions than domestic workers would. In addition to these policies, governments also regulate their labour markets by creating temporary foreign workers' programs. Foreigners are given special visas to come and do specific work. They are expected to leave at some point. Some of these programs are large in scope, others are focused on resolving specific labour shortage difficulties. In Australia, the visa program which, notionally, exists to attract workers with skills not easily found in Australia has grown enormously and currently has little pretense to be aimed at remedying the lack of special skill sets. Visa workers fill 18 percent of all food industry jobs and 13 percent of hospitality jobs. By 2016, there were close to 500,000 temporary visa workers, creating, in the words of economist Alan Kohler, "a pool of labour that drove wages down." In Canada, the temporary migrant program is

notorious for its importation of Mexican and Caribbean farm workers. They are not given any of the rights of citizens, and have little to no access to social wage benefits or protections found in minimum standards legislation. Often they are under threat of deportation if they dare make a fuss, and, in quite a few cases, they are assigned to one employer and cannot leave if they might find better conditions elsewhere. The consequences are horrible. The pandemic made that evident.

In Ontario alone, by the middle of 2021, 2,400 farm workers had been infected by the coronavirus. Several died. As this situation came to light, the Migrants Rights Network was able to shine a spotlight on some of their working conditions. A survey it conducted showed that almost half of their respondents shared a bedroom, with four to eight people in a bunkhouse. The majority shared a bathroom and kitchen with between six and twelve people. The pay was low. Lowering labour costs is the principal goal of these programs. Indeed, Kohler argues that this goal was the reason that governments favoured the program to bring foreigners to Australia, at the same time as these same governments exhibited repellent xenophobic tendencies when it came to crafting refugee or immigration policies.

None of this is calculated to give credibility to the claim that work under capitalism is a platform designed to enrich human beings' lives; enhancing profits for employers remains the paramount goal in the work-for-wages spheres.

### *The dignity of labour?*

Not only is it hard to find reasonably paid and secure jobs for many people, but the jobs all too often heap indignities on workers. This is due to the never-ending employer drive to make workers work harder for every dollar they earn, often worsened by the palpable desire of some crude employers to assert their personal control over fellow human beings.

**Item:** Even in some of the richer countries in which a mature social wage regime exists, workers are forced to take jobs which leave them suffering from food insecurity. "Food insecurity" is an Orwellian phrase invented by policy-makers and pundits to say that people are going hungry. They cannot provide enough food for themselves and their families. Charity has had to

step in. In Canada, the estimate is that one in six to seven children has to go without some food some time during any one week; in Toronto, the Samuel Centre for Social Connectedness reported that, in 2022, one in four children suffered food insecurity. A decade earlier, one major Canadian food bank, Daily Bread, reported that, of the households which reported that they suffered food insecurity, 65 percent reported that someone in the household was employed. A little less than half of those employed people had jobs which provided no employer-based benefits and about 20 percent of them did not expect their jobs to last for more than a year. One of the conclusions reached by Daily Bread was that "employment has not provided the stability or income needed to escape poverty." As they take their families to food banks, employed people experiencing these conditions must find it hard to believe that work is enhancing either their self-respect or their dignity.

This is not just a story about a few people who fall between the cracks. The exploitation of workers and taxpayers is part and parcel of large segments of the employing class's business model. Recent studies by the University of California, Berkeley, and by the General Accounting Office of the US reported that many large corporations paid their employees so little that they knew that the workers would have to apply for state and federal assistance to survive. The calculation was that US taxpayers are asked to top up these low-income people's wages to the tune of $153 billion each and every year. The amounts are so great because the low-paying corporations are so large (and so profitable). The list of corporate predators includes behemoths like Dollar Tree, Dollar General, Burger King, Wendy's, Taco Bell, Home Depot, Lowe's, Walgreens, CVS, Uber, Walmart, and McDonald's. The *Atlantic* has reported that this low pay and reliance on the social wage to help working people survive is so much part of the business model that outfits like McDonald's actually have a help line for employees who find themselves suffering food insecurity on their McDonald's pay. They are to contact "McResources," where an operator will tell them how to get food stamps or access to Medicaid.

Dignity? It would be risible if it was not so sad.

**Item:** In October 2021, the Government of Ontario announced its intention to enact new protections for truckers and couriers of all types. It was proposed that these workers would have the right to use washrooms at Ontario businesses where they picked up or delivered. The government touted this initiative as a much needed act of common decency, one which, said the minister, would enhance the benefiting workers' dignity. That such a provision is even necessary speaks volumes to the respect and dignity normally accorded to workers. It came in the midst of revelations that, in their drive to get as much production out of every worker as they could, employers of truckers set them schedules which did not give the drivers time to go to washrooms. Amazon was forced to admit this had caused many of its desperate drivers to pee in a bottle. To excuse itself, Amazon said it was not the only employer which pushed and pressured its drivers; such practices, it averred, were common in the delivery and courier business.

That kind of business model, those kinds of working conditions, do not lead to a sense that work promotes the kind of self-respect promised by the defenders of the system.

**Item:** The employing class has always begrudged workers any breathing time, any time in which they were not producing value for the employers. The longer, the harder, and the faster employers can make workers work, the more profits are made. Tough, close, intrusive, and continuous oversight to keep workers at their tasks has been a central feature of capitalist modes of production since day one. Initially, the employer or its managers took a hands-on approach. Their capacity to watch and pressure became all the more effective when technology could both simplify the tasks of workers and dictate the speed of work. The resulting drudgery and tyranny was unforgettably depicted in Charlie Chaplin's classic *Modern Times* (1936). The word "tyranny" is not lightly chosen. The drive to get more out of each worker is enforced by the employers' ability to discipline "slack" workers, much as tyrants might their subjects. (There was some elaboration on these disciplinary powers in chapter eight). In addition, the fear inculcated is exacerbated as this relentless employer pushing and shoving, this tyranny, brings life-threatening dangers to workers.

Truck drivers are asked to do many hours without relief. This endangers them and all others on the roads. The fatality and injury rates are extraordinarily high in this industry; so are the measurable cases of stress. More generally, in the late 1960s and 1970s, as the Japanese economic engine got into high gear, it became known that there was a real cost to the frenzied drive to produce more, more quickly and cheaply. The Japanese word for death by overwork, Karoshi, became part of the language of those who described and tried to emulate Japan's highly successful productive practices. Eventually, the phenomenon of increased deaths from strokes and heart attacks plainly attributable to the stress and physical toll imposed by long hours, by the speed of work expected, and by the demands made by driven and driving employers brought Japanese modes of production into disrepute. Intense scholarly and public commentaries pushed both governments and major employers to provide better conditions. The attention the phenomenon got and the cries for its reform underline the brute fact that the very lives of workers are in jeopardy if capitalists are not reined in. Many other examples of how the employers' push to maximize profits outweighs any inclination they may have to promote human beings' well-being can be found. Here are a couple.

Foxconn, a major Taiwanese electronics manufacturer of the components that make our telephones and devices work, became notorious because it was alleged that an extraordinary number of its employees committed or attempted to commit suicide. The supporters of the prevailing modes of production tried to deflect the reputational harm done to Foxconn and its major clients, Apple and Hewlett-Packard, by saying that the rate of suicides at Foxconn was not particularly worse than it was at other comparable plants. This speaks volumes about how tolerant capitalists and their allies are about risks they ask workers to take to keep the profit mills grinding. Sometimes, however, they are unable to hold the line against mounting criticism. This is what happened when France Telecom decided to force many of its workers to leave their employ as part of its desire to rationalize its operation. Its executives began to push people into despair so that they would "voluntarily" leave. They deployed strategies such as arbitrarily transferring workers to different and distant locales, isolating some workers from their colleagues, giving many others humiliating tasks … In short, the company's executives were completely oblivious to the

workers' well-being and hopes and desires for self-respect and dignity. And, given the tenor of this chapter, it is worth underscoring that they thought that the law gave them the power to do all these things. In this case, involving a corporation which occupies a central position in French politics and its economy, the public was outraged when it was alleged that its managerial practices had led to sixty suicides between 2006 and 2009. This forced the government to act. Not only was the corporation convicted of a crime, but several managers were sent to jail for what the court called institutional harassment.

All of this driving, all of this controlling, from *Modern Times* (and before) onwards, was done in the name of efficiency; all of it involved employers managing workers so that *employers*' goals could be achieved. The notion that one of work's purposes is to advance workers' self-respect, pride, and dignity is not part of the employers' understanding of the relationships they have with their workers, whatever the defenders of capitalist modes of production may say.

The most recent technologies have made this as plain as it can be. Contemporary surveillance gives employers more ability to oversee and drive their workforces. The surveillance facilities include the collection of data through handheld devices, GPS, cellphones, cameras, keystroke tracking, personal e-mails and videos, wearables, and biometric timekeeping software; they include benign, but invasive, workplace well-being apps. All these surveillance mechanisms can be built into workplace computer software. There is even the capacity to track workers' emotional tenor when dealing with customers who have telephoned call centres. It is stressed here that all these wondrous technical innovations are used to get more work out of workers, not to make their lives easier. Indeed, the combination of employers' desire to control workers, rather than use technologies to give workers more autonomy, has given birth to a new industry. As workers are less and less often in the physical space controlled by their employers, employers, fearful of being "cheated," have proved themselves willing to pay for services which enable them to watch people as they work in their homes or in faraway places. Firms—with telltale names like ActivTrak, Hubstaff, Time Doctor, VeriClock, and innerActiv—give employers a so-called dashboard which provides them with information about individual workers, such as the amount of time spent on

screen, the active use of their mouse, what is on the workers' screen at any time, and their physical location, including bedrooms and bathrooms. Unsurprisingly, these kind of monitoring technologies are often referred to as "bossware."

The message to workers is what it always has been: You are being watched. You are not trusted to do your job with the diligence and skill the employers have an absolute right to demand of you. This is hardly a recipe for the creation of an environment in which self-respect is to be fostered, in which workers feel that their desire to, voluntarily and spontaneously, make a valuable contribution to society is being promoted, in which coming to work (or going online to work) feeds their sense of dignity.

### *Worker satisfaction?*

There is much to be done to serve a well-functioning society's true needs. Workers employed to meet those needs should derive satisfaction from this socially valuable use of their abilities. Thus, workers employed in the production of food, clothing, shelter, delivery of goods, transportation, removal of health-damaging toxic waste, or provision of education and health services should expect to get much more than mere income from their work. Self-respect, dignity, the joy of being of service to others should enrich their lives. For some workers in these vital spheres, this turns out to be true. For most it does not.

**Item:** Teachers, medical practitioners, and nurses may well feel sanguine that the work they do is valuable to society. This should shore up their self-respect and satisfaction with their chosen professions. The same is not true for all the other people who work in education and health. Nor is it so for many of those who labour in the food, clothing, construction, delivery, transport, and waste-removal industries. To the contrary. What the long-lasting COVID pandemic revealed to one and all (including the many who had never bothered to look) was that workers who did all the heavy lifting when it came to satisfying society's absolute needs—the deliverers, the grocery checkout clerks, the shelf-stockers, the warehouse workers, garbage collectors, public transport drivers, maintenance workers and mechanics, meat-packing workers, cleaners, cooks, personal workers in care centres

and schools, migrant farm labourers—endure debilitating conditions and have little control over what they are required to do and as to how they are to do it. It turns out that these workforces are largely made up of the more marginalized among us. Women, the ethnically different and racialized, recently arrived persons, documented and not, do much of the work in these sectors. The pandemic brought to light their centrality to the provision of society's needs. Governments forced them to work by giving them the choice of going to work for their employers which had been declared essential businesses or to give up their jobs and go hungry.

Inevitably, it was these workers who suffered the most infections. As the uneven impact of the pandemic became obvious, the public could not help but notice that these needed workers were also very poorly paid and had very insecure jobs. It was something of an awakening: the public came to realize that the kinds of workers who were rewarded the least by their employers, who were respected the least by the public, and were perceived as having low status in society were major contributors to that society's welfare. Belatedly, perhaps a little self-conscious and ashamed, the public showed its appreciation: pots and pans were banged; slogans such as "We are all in this together" were hung on balconies and porches and dutifully mouthed by politicians. To many of the poorly paid and long-disrespected workers, these well-intentioned gestures must have seemed hollow, somewhat mocking. Working under the conditions they experienced had never allowed them to bolster their self-respect; their low pay and insecurity had never been offset by their sense of making a valuable contribution to others, as those others had never shown the slightest recognition of these contributions. They already knew the truth given voice by Martin Luther King: "Dignity is also corroded by poverty…. No worker can maintain his morale or sustain his spirit if in the market place his capacities are declared to be worthless to society." They knew that their work was not its own reward.

In addition, many of the workers who do necessary work are asked to do the nastiest of things. Eyal Press, in *Dirty Work: Essential Jobs and the Hidden Toll of Inequality in America* (2021), emphasizes one aspect of the plight of workers who find themselves in such circumstance. He observes that the better-off in society want some very unpleasant work to be done, work which makes them feel terrible because they are participating in doing

things which are repellent or harmful or soul destroying. The wider public turns a blind eye to what the operators of drone killing machines, wardens in prison psychiatric wards, workers who have to slaughter penned-up chickens and pigs, etc., have to do, and then accord the workers who do these things on its behalf no respect. Press equated this indifference with that of the Germans who, after World War II, expressed their shame about the way the Nazi regime had treated Jews but who also acknowledged that, before the horrors were inflicted, they had felt that something had to be done about Jews.

Guilt feelings without any sense of responsibility. The prevalence of this attitude holds out little hope for the enhancement and fortification of workers' sense of worth.

**Item:** Not only are there huge numbers of disaffected workers, even though they contribute to the fulfillment of society's needs, there may well be countless others who, while they are accorded more social status and earn more income from their work, find their work singularly unrewarding. This comes about because outcomes of their work have little intrinsic social value. Anarchic capitalists have zero interest in having work done just because it might further social needs. The pressure which drives them is to make as much profit as they can. If the supply of essential needs does not yield as much profit as another endeavour might, the latter gets the nod. In a capitalist regime, therefore, many productive activities serve frivolous purposes, goals without much social value, sometimes even goals which have anti-social outcomes. A short list includes such greed-satisfying enterprises which serve no social good as casinos, electronic games, and betting on electronic games (as in "I am betting that X will make the next kill"); vitamins to relieve the stress suffered by pets and supplements for pets, birds, and lizards; branding; naming buildings; sports paraphernalia; bottling already potable water; manufacturing and marketing allegedly, but scientifically untested, nutritious food and medical products, often aimed at maladies which few people knew were disabling conditions; investing in breast or penis enlargement because it pays more than it does to do research to produce preventive vaccines or equipment; producing arms and guns, pesticides, and tobacco; mining using harmful chemicals; denuding forests

to grow palm trees to make oil for cosmetics; doing administrative jobs in parasitic services like brokerage houses, etc.

This kind of listing is controversial because some of these products are seen as useful by some people and some have both socially and not-so-socially useful attributes. The point here is that, because of capitalism's structural disinterest in providing for fundamental human needs, many people find themselves working in settings where it is not clear to them that what they are doing is worth doing. Of course, the extent to which this psychic debilitation prevails depends on the way workers feel. This makes measuring it difficult, as it depends on guesses about what other people feel, a somewhat fraught exercise. In *Bullshit Jobs: A Theory* (2018), David Graeber argues that there is a yardstick which can be used to deal with this difficulty. He suggests:

> A bullshit job is a form of paid employment that is so completely pointless, unnecessary, or pernicious that even the employee cannot justify its existence even though, as part of the conditions of employment, the employee feels obliged to pretend that this is not the case.

Graeber produces the results of surveys which ask people how they feel about their jobs. Only a startling 50 percent of UK respondents to one such poll thought their work made any sort of meaningful contribution to the world, while 37 percent were confident that they made no worthwhile contribution whatsoever. In The Netherlands, a similar survey reported that 40 percent did not believe their work had any social value whatsoever. However one assesses these results, they do signal that, in many, many cases, work done under capitalism is not capable of bringing the psychic benefits promised by the pundits who claim that work brings not only income but also a healthy amount of satisfaction.

## A MORE REALISTIC MANTRA: "WORK COULD BE GOOD FOR YOU IF IT WERE NOT FOR CAPITALISM"

The foregoing discussion suffices to make the point that there are structural reasons which explain why the supposed benefits of working, other than earning an income, are, at best, collateral objectives when work is done to

advance capitalists' goals. The ownership of the means of production is firmly lodged in the hands of the few. This regime of private property relations accords a disproportionate amount of political and economic power to the ownership class. The maintenance of the property and power imbalance is legitimated by law. In addition, even as law *structurally* naturalizes the exercise of that power, it, as has been shown throughout this book, *instrumentally* gives the employing class help to take advantage of its privileged structural dominance. As employers deploy their legally mandated and assisted power to their advantage, they often do so at the expense of the sense of workers' self-respect and dignity. They do not do this because they are mean—although some may be. They do it because it inheres in the logic of capitalist relations of production. Paul Sweezy, the Marxist economist who founded the *Monthly Review*, notes that "under capitalism ownership of the means of production is vested with one set of individuals while work is performed by another"; this entails, wrote the doyen of Canadian political philosophers, C.B. Macpherson, "a continued net transfer of part of the power of some men to others, thus diminishing the equal individual freedom to use and develop one's natural capacities."

Despite the fact that all conceptualists and theorists—including those who cheer for capitalism—agree that it is important for human beings to derive satisfaction from a job well done and from the sense of self-respect and pleasure that comes from supporting others, these are not the primary goals (indeed, they may be the least significant goals) of the real-world operations of capitalist relations of production. This is becoming increasingly visible. Bookshelves and online bookselling services are crammed with recent titles reflecting the growing sense of the emptiness of work under capitalism: Miya Tokumitsu, *Do What You Love: And Other Lies about Success and Happiness*; Sarah Jaffe, *Work Won't Love You Back: How Devotion to Our Jobs Keeps Us Exploited, Exhausted and Alone*; James Livingston, *No More Work: Why Full Employment Is a Bad Idea*. So, why do so many of today's conventional opinion leaders keep insisting that work brings more than income, that it could and does enhance human beings' well-being?

It is largely because they understand that human beings want and need more from life, from work, than the ability to survive. They glean this from the evidence of the daily grumblings and disaffection noted above, as well

as the many resistance struggles, strikes, both lawful and unlawful, and occasional revolutions, the history of which dot capitalism's reign. They need to hang on to the idea that the dominant regime of production can deliver on this front. They are forced to argue that, despite the weight of evidence to the contrary, work under capitalism can and will enrich people's inner lives. It is a difficult position to maintain.

To these defenders of the status quo, it is right and just that those who own the means of production should be allowed to use their capital to accumulate more wealth. It makes sense to them, therefore, to claim that the workers they hire to attain their goals are engaged in endeavours of the greatest importance to the system and to themselves, namely the pursuit of increasing material wealth. This logic puts a premium on casting human beings as being primarily—virtually only—economic beings. This is a much-contested notion.

Over the ages, religious leaders, texts, philosophers, and teachers have contended that all human beings have many capacities, distinct potentials which need to be developed. Humans are not to be thought of as mere cogs in some social organizational machine. This is why ancient writers and thinkers spoke, and so many of us now speak, about self-respect and satisfaction when serving others, why they thought, and so many of us think, that human beings possess an innate dignity that must be preserved. Of course, it is understood by all that there is an economic task to be discharged. Goods and services must be produced to make any society viable. Homo Faber was the name given to those labourers who did this producing in ancient times. But, the old scholars observed, the necessary labour did not allow the labourers to become perfected humans; to the contrary, they were unfulfilled ones. Philosophers such as Plato and Aristotle viewed this kind of necessary productive work as intervening with human beings' true calling, with their need for personal development and the development of their ability to serve their society. This is why they favoured the idea that productive, albeit necessary, work be done by lesser beings, by slaves. This gave free men (never women, of course) the time to study, to educate themselves and others, to practise the arts. They would have leisure time. A.R.C. Duncan, head of the Department of Philosophy at Queen's University, points out that the Greek equivalent of our word "leisure" was the Greek word "schole," from which comes our word

“school,” a place where children are to study, to develop the kind of understanding which will help them and their society thrive. Learning is perceived as a positive activity to yield concrete and morally satisfying results. He points out the Greek equivalent of our modern word “business” was the negative form of “schole,” something which needs to be done but which is not intended to satisfy the person doing it as a person. Duncan concludes that, to those long-gone but still influential Greek scholars and thinkers, “a man’s leisure-time was the part of his life in which he did things he really wanted to do, the things which gave him satisfaction; business was something he had to conduct in order to keep alive or earn a living,” much as men might feel they had to engage in undesirable wars to live happily in peace. Leisure was the way toward personal and social fulfillment.

Homo Faber, then, is useful, but our true aspiration should be to develop ourselves as Homo Ludens, “man at play.” Not frivolous play. What is envisaged are human beings who can exploit time to fulfill themselves, to hone talents and make art, to make contributions to a rich democratic society. It was the holy grail then, and it still has enormous appeal. It is an idea that is to be contrasted with capitalism’s adulation of the selfish individual. The Scottish American philosopher Alasdair MacIntyre, for instance, believes that the human goal should be a co-operative and creative individualism, as contrasted with capitalism’s production of what C.B. Macpherson called possessive individualism. Macpherson conceives of human beings as doers and creators able to enjoy their human attributes. Those attributes are to be enjoyed for themselves, not as a means for the accumulation of economic/consumer satisfaction. His list of attributes that a better society would foster as ends to be enjoyed in and for themselves includes the capacity for rational understanding, for making moral judgments, for aesthetic creation, for emotional activities like friendship and love—a far, far cry from collecting and accumulating things and money, the chief objective of contemporary capitalism.

The force and appeal of the ideas which underpin the millennia-old calls for the perfection of human beings are integral parts of our histories and cultures. It is this which causes capitalism’s defenders to express their belief that these worthy goals and values are attainable within the system they favour. But to maintain this position, they cling to an idealized notion of

market capitalism, one which, to be fair, persuaded some giants who were early proponents of market capitalism of its worth. Famously, Adam Smith, writing in 1776, said that economic efficiency would result from unfettered market activities undertaken by self-serving, self-standing butchers, brewers, and bakers. He saw doers who had some property following their own stars as the key to the market capitalist system he favoured. Nearly a century later, by which time it had become clear that there were large numbers of people who had no wherewithal to engage in the economy in this idealized way, Abraham Lincoln noted that they were free to offer themselves for hire and that prudent workers had the opportunity to save and become self-standing entrepreneurs, an objective which would give them true autonomy, true freedom. In short, market capitalism was not only an efficient means to produce welfare, but was also capable of allowing human beings to fulfill their aspirations, both economic and non-materialistic, because they were deciding for themselves how to use their talents and resources, permitting them to pursue their non-economic and economic aspirations as they choose. If this is how market capitalism really worked, capitalism could achieve some of the objectives earlier schemes of social relations had stoutly denied.

In the class-divided regimes which preceded capitalism, the appropriating class took the surplus value produced by the labouring classes by transparent force. Feudal-type systems were designed to allow the feudal overlords to depend on the use of military forces, religious and political institutions, and judiciaries to enforce and justify their direct taking from the subjugated classes. It is not difficult to see what stopped working men and women who endured this set of social relations from developing their potential as emancipated human beings. The initial division of property, and the rights that came with it, prevented any human advances. It is in this context that the much-noted *Utopia & Dialogue of Comfort* by Sir Thomas More was published in 1516. More's *Utopia* posited that substantive equality was needed to allow human beings to flourish. This required ensuring the capability of one and all to contribute by being educated in agricultural practices and, in addition, in important and useful crafts; necessary work was to be shared and all should enjoy shorter working days; freedom of religion was to be tolerated; euthanasia and divorce were to be made easier; health care was to be accessible to all; and, of course, as it was

dominium over private property and the rights it gave owners which blocked all these to-be-welcomed developments, it was to be abolished. To Thomas More, the source of the problem and the kinds of ideals by which life should be lived were obvious. The world he wanted was not compatible with the existing system of social relations, so its structural foundations had to be rejected.

Adam Smith's *idealized* market capitalism notionally did not erect the kind of barriers to human development which Thomas More wanted to remove. But market capitalism has never come close to working as Smith hoped it would. As has been repeatedly noted in this work, the dramatic inequality in power consequent upon the continued, and legally protected, vast disparity in ownership of the means of production ensures that those without property must find work to survive. And, despite Lincoln's hopes, very few are able to save enough to become producers on their own account, butchers, brewers, and bakers who can aspire to enrich their lives because of their independence. This is so because the employing capitalists are driven by the logic of the system which requires them to compete with others as they strive relentlessly to accumulate ever more wealth. The combination of competition and the maximization of profits pushes them to seek advantage by swallowing other competitors and by deploying innovative advances in technology. Many of the novel ways of doing things are intended to reduce the costs of labour. The results are in. The parlous outcomes for workers, documented in this and previous chapters, are part and parcel of the evolution of capitalism, indeed are the essence of capitalism. Marx captured the processes which dehumanize workers:

> Within the capitalist system all methods for raising the social productiveness of labour are brought about at the cost of the individual labourer; all means for the development of production transform themselves into means of domination over, and exploitation of, the producers; they mutilate the labourer into a fragment of a man, degrade him to the level of an appendage of a machine…. Accumulation of wealth at one pole is, therefore, at the same time accumulation of misery, agony of toil slavery, ignorance, brutality, mental degradation, at the opposite pole, i.e., on the side of the class that produces its own product in the form of capital.[11]

A major riposte has been that, while market capitalism has warts, it has great potential. In a much-quoted article, John Meynard Keynes made this case with some panache. Writing in 1930, he argued that, despite the severity of the Depression, there was no reason for despair. In the last couple of centuries capitalism had brought much more abundance than any other scheme had over the thousands of years preceding its advent, and this had been accomplished because of the stunning explosion in technology, writ large. There was every reason to believe, wrote Keynes, that this progress, supported by ever-more sophisticated and innovative technologies, would put an end to the Depression, and soon, very soon, the gains should be spectacular. Here Keynes presents a remarkable argument.

He admits that capitalism's success has not brought people the kind of world in which they want to live or should want to live, and he looks forward to the day when human beings will no longer be in thrall to its logic:

> When the accumulation of wealth is no longer of high social importance, there will be great changes in the code of morals. We shall be able to rid ourselves of many of the pseudo-moral principles which have hag-ridden us for two hundred years, by which we have exalted some of the most distasteful of human qualities into the position of the highest virtues. We shall be able to afford to dare to assess the money-motive at its true value. The love of money as a possession—as distinguished from the love of money as a means to the enjoyments and realities of life—will be recognised for what it is, a somewhat disgusting morbidity, one of those semi-criminal, semi-pathological propensities which one hands over with a shudder to the specialists in mental disease. All kinds of social customs and economic practices, affecting the distribution of wealth and economic rewards and penalties, which we now maintain at all costs, however distasteful and unjust they may be in themselves, because they are tremendously useful in promoting the accumulation of capital, *we shall then be free, at last, to discard.* (emphasis added)[12]

Keynes was clear: capitalist relations of production have brought wealth and will yield more. Until capital had yielded as much wealth as it could

possibly generate, which he then expected to be roughly a hundred years hence, he regretted that society would continue to have to put up with the ugliest of lives: “avarice and usury and precaution must be our gods for a little longer still.” But liberation would surely come, Keynes predicted. He had faith that the technologies and the innovators which had let capitalism bring a huge increase in wealth would make ever greater contributions, making work, in the self-serving, money-making sense, virtually unnecessary. His calculation was that everyone spending fifteen hours a week on necessary labour would keep everyone well provided for and ready to satisfy their desires to educate themselves, to serve others, to hone their skills and such artistic talents as they might have. His major concern was whether people would be able to do this after centuries of capitalist relations of production had fostered the basest of goals as human goals.

This faith that technological advances under market capitalism will free people from working too long at unrewarding tasks had also been evinced much earlier by Edward Bellamy. Rather arrestingly, he was, like Keynes, driven to write his utopian book during a period of economic recession following a deep depression that ravaged economies between 1873 and 1879. In 1888, his *Looking Backward: 2000–1887* was published. It envisaged a world where the rational use of technology provided all with everything they needed, while parcelling out the still necessary work among all. This would leave a great deal of scope for enjoying life as people chose (after they reached the age of forty-five).

The year 2000 has gone by without any of these predictions showing any sign of having come true. The year 2030, Keynes’s designated moment of truth, is fast approaching and there is nary a sight of the kind of world he posited. And this looming failure is not due to the fact that there have not been remarkable technological innovations, that there have not been vast advances in finding, gathering, and manipulating resources and talents. We have made much technological, but little human, progress.

The key is that these optimistic views of the capacity of market capitalism to meet human beings’ non-material needs are based on faith, a faith which is misplaced because it does not question the influence that capitalist relations of production exercise over the nature and uses made of new innovations and technologies. This was central to the vigorous critique of Bellamy’s work by William Morris. Morris, writing shortly after *Looking*

*Backward* appeared, pointed out that Bellamy's work was appealing to many because it purported that *scientific* development would necessarily reduce the hours of labour which human would have to do. Morris pointed out that history proved otherwise. Human beings had always sought technological solutions to deal with problems as they arose, say, because of the restraints imposed by a particular culture or the vicissitudes of climate or the changing fertility of soil. All that had happened was that, as novel productive tools were devised to satisfy the current desires, fresh desires and fresh demands on nature arose. He averred that "this will always be so, and the multiplication of machinery will just—multiply machinery." His conclusion that this would always be so if the goal was simply to reduce labour as opposed to reducing the pain of labour or, better, making labour a joy, appears to be borne out by the way we live today.

Despite Keynes's prediction that innovation and technology would reduce labour, more people are engaged in work-for-wages arrangements than at any time in history. David Graeber has documented how spanking new information technologies, combined with breakthrough transport innovations—aided by legal technologies which make state borders porous and which safeguard mobile property and its owners—have allowed heavy industrial jobs to be farmed out to East Asia, Latin America, and more recently to Africa. In those outposts, the technologies used are much more primitive than those which would have been used in the dominant capitalist jurisdictions. In the latter, the reduction-of-painful-labour argument has some (although not all that much) credibility, as many people have jobs which let them work in better conditions—glitzy offices, their own homes—employing computers and other electronic tools. All this, Graeber argues, tends to hide the fact that this apparent coming true of the dream that technology will free people from drudgery and hurt is just that, apparent: "Our carefully engineered high-tech sneakers were not being produced by intelligent cyborgs or self-replicating molecular nanotechnology; they were being made on the equivalent of old-fashioned Singer sewing machines, by the daughters of Mexican and Indonesian farmers who, as the result of WTO or NAFTA-sponsored trade deals, had been ousted from their ancestral lands." As the catalogue of aspects of work gathered in this chapter show, many of the jobs being created during this time of eye-

popping new inventions and ways of working are not only hard and unhealthy and insecure jobs, but, all too often, also degrading jobs.

And, as Jaffe's *Work Won't Love You Back* and Graeber's *Bullshit Jobs* document, capitalists driven to compete and accumulate have found ways to spur "fresh desires and fresh demands on nature," likely unimaginable to the very imaginative William Morris. People are occupied doing tasks that have little social purpose, even though they use wondrous new technologies. The goods and services produced allow others to satisfy desires they did not know they had until the service or game was provided by profit-seeking actors aided by a parasitic branding or advertising firm. Many of the jobs are not rewarding and/or do not provide needs that society has to satisfy to be viable; many just feed the very consumerism which allows capital to use its innovations and technologies to feed the lust for self-indulgent recreation.

In sum, the defenders of capitalism put a tremendous emphasis on the potential for technology and innovation to create a post-scarcity society. Once that is done, they suggest, the project to allow human beings to perfect themselves becomes realistic. This discounts the inherent logic of capitalism. Capitalism is a system intent on maintaining and perpetuating its viability. It is a system based on competition in a setting where resources are unequally divided, creating power conflicts between the haves and have-nots. It is logical for the dominant class to deploy its resources so as to allow it to extract more value from those who must work for it. Syracuse University sociologist Aaron Bananav notes that "it is important to recall that technologies developed in capitalist societies are not neutral: they are designed to embody capitalist control, not to free humanity from drudgery." This explains the manifest failure of the promises made by the Keyneses and Bellamys: their starting point is not that capitalism has to change, but that technology will bring about the changes. Utopian writers like Morris and More begin with the idea that we should envisage a world of substantive equality, where human beings are not in competition with each other or their environment. The notion here is that people must work to provide themselves with necessities, that they have an obligation to make sure all have access to the necessities, that all have to collaborate and to that end will form voluntary associations. This is why Thomas More would have abolished private property or money as a way to measure everything

(achievements, worth). In such a setting, technology and innovation might well advance the cause, but only in this kind of setting would it become realistic to give resonance to the slogan coined by Étienne Cabet in his 1840 tract *Travels in Icaria*: "To each according to his needs, from each according to his strength."

Socialism versus capitalism is the issue: if human beings have potentials which are repressed, restrained, and ignored, those potentials will not be realized under capitalism. Work under capitalism does not advance this cause, and its basic structure indicates that it never will. How to go from here to a system of social relations that will not just shorten the period for which all have to work but actually make work an integral part of living, how to get to—in the colourful words of Ernest Mandel—a world in which it becomes possible for "material disinterestedness … [to be] crowned by the creative spontaneity which brings together in the same eternal youth the playfulness of children, the enthusiasm of the artist and the 'eureka' of the scientist"?

I have neither the ability to answer this question, nor is it pertinent to my modest effort aimed at depicting the nature of work under capitalism. There are many who write and advocate about the politics of regime change. For the record, I find Michael Lebowitz's approach, informed by working on the Hugo Chávez experiment in Venezuela, in his *Build It Now: Socialism for the 21st Century* particularly helpful. I leave the issues about how to formulate goals and devise strategies to attain them to political economists and activists on the ground. I restrict myself to contribute to their efforts by offering them the essence of my observations:

- the basic structure of capitalism, namely the unequal division of property, the competitive drive to accumulate more property, makes work under capitalism unrewarding in the human sense. Human beings will never enjoy the autonomy, the freedom, the flowering of their inherent attributes with which they are endowed if they are forced to live under these conditions;
- the structure which makes capitalist relations so inimical to the fulfillment of human needs is endorsed and legitimated by law;
- law not only maintains this system in place, it actually helps the owners of the means of production in the daily exercise of their powers;

- law is, in fact, one of the technologies standing in workers' way as they fight to improve their lot; and
- law becomes an arena of struggle about the nature of work and the possibility of emancipation from the fetters imposed by capitalism.

# ACKNOWLEDGEMENTS

This book is an acknowledgment of the way in which human beings never cease to struggle to establish a world in which they will be free to fulfill their potential to live as humane members of communities in which all support all others, in which all can explore their talents and capacities. My personal experiences and all the teachings to which I have been exposed—by formal instructors, by the books and articles I have read, and by my many students who forced me to question the ideas and ideals I presented to them—have made me aware that so many want to live a life that the logic of capitalism will not let them live. I am in awe of the multitudes who, on a daily basis, try to throw off the shackles under which we exist. They want to build what Michael Lebowitz called a solidarian society, "a 'gift economy', one in which those who give are rewarded not by the anticipation of what they might receive at some point in return but rather because not to give violates one's own sense of virtue and honour." This book, offering some views on how the evils those activating for a different society want to address are perpetrated and might be confronted, is my way to pay homage to these activists and their ennobling project.

My efforts have been encouraged by the longstanding and continuing desire of all at Between the Lines to promote the dissemination of ideas which might make a difference. It takes a kind of admirable stubbornness in our money-oriented society to keep a non-hierarchical, poorly funded organization alive and lively. Between the Lines is doing just fine. My admiration is sincere. And so is my gratitude to Tilman Lewis who, once again, quietly, gently, made the editorial suggestions which improved the manuscript greatly.

# SELECTED NOTES

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